SUPREME COURT OF THE UNITED STATES.

No. 274.

JESSE RIDDLESBARGER, PLAINTIFF IN ERROR,

vs.

THE HARTFORD FIRE INSURANCE COMPANY OF HARTFORD, CONNECTICUT.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE STATE OF MISSOURI.

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a UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the Judges of the Circuit Court of the United States, for the district of Missouri, greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court, before you, at October term, 1866, between Jesse Riddlesbarger, plaintiff, and the Hartford Fire Insurance Company, of Hartford, Connecticut, defendant, a manifest error hath happened, to the great damage of the said plaintiff, Jesse Riddlesbarger, as by his complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under you seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the first Monday of December next, in the said Supreme Court, to be then and there held; that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and custom of the United States, should be done.

Witness, the Honorable Salmon P. Chase, Chief Justice of the said Supreme Court of the United States, this fourth day of October, in the year of our Lord one thousand eight hundred and sixty-seven.

Issued at office, in the city of St. Louis, with the seal of the Circuit Court of the United States for the district of Missouri, dated as aforesaid.

[SEAL.] BEN. F. HICKMAN,
Clerk C. C. U. S. Missouri District.

Allowed by SAMUEL TREAT, *Judge.*

UNITED STATES OF AMERICA, *District of Missouri*:

In obedience to the within writ of error, I herewith send a certified copy of its record, in the case of Jesse Riddlesbarger against the Hartford Fire Insurance Company, of Hartford, Connecticut.

Given under my hand and the seal of Circuit Court of United States for district of Missouri, this 4th day of October, A. D. 1867.

[SEAL.] BEN. F. HICKMAN,
Clerk of said Court.

5l. The United States of America, to the Hartford Fire Insurance Company, of Hartford, Connecticut, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the first Monday of December next, pursuant to a writ of error filed in the clerk's office of the Circuit Court of the United States for the districts of Missouri, wherein Jesse Riddlesbarger is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Samuel Treat, one of the Judges of the Circuit Court of the United States for the districts of Missouri, this fourth day of October, in the year of our Lord one thousand eight hundred and sixty-seven.

SAMUEL TREAT.

UNITED STATES OF AMERICA, *Eastern District of Missouri, ss*:

Executed the within writ by reading the same to Edward Morrison, Secretary of the within named Fire Insurance Company, at St. Louis, in the said dist., on October 7th, 1867.

J. B. ROGERS,
U. S. Marshal, E. Dist. Mo.
By J. W. MORGAN, *Deputy*.

Marshal's fees, 1 service, travel: $2 00.

1) MISSOURI DISTRICTS, *sct*:

Pleas before the Honorable the Circuit Court of the United States for the districts of Missouri, at the October term thereof, in the year A. D. 1866.

JESSE RIDDLESBARGER, plaintiff,
agst.
THE HARTFORD FIRE INSURANCE Company, defendant.

Be it remembered, that on the fourth day of February, in the year of our Lord eighteen hundred and sixty-five, there was filed in the clerk's office of the U. S. Circuit Court, Missouri districts, a transcript of the record and proceedings from the Court of Common Pleas, Saint Louis County, State of Missouri, which transcript is in the words and figures following, to wit:

STATE OF MISSOURI, *County of St. Louis:*

Be it remembered, that heretofore, to wit: on the twenty-seventh day of July, A. D. eighteen hundred and sixty-four, there was filed

in the office of the clerk of the St. Louis Court of Common Pleas, within and for the county aforesaid, a petition which is in the words and figures following, to wit::

Petition.

JESSE RIDDLESBARGER, plaintiff,
against
HARTFORD FIRE INSURANCE COMpany, defendant.

2 *In the St. Louis Court of Common Pleas, St. Louis Co., Mo., Nov. term* 1864.

Plaintiff states that heretofore, to wit: on the first day of June, eighteen hundred and sixty-one, defendant, by her certain written policy of insurance, (which is now here to the court shown,) in consideration that plaintiff would pay defendant one hundred dollars premium, undertook and faithfully promised plaintiff to insure him in manner following; that is to say, against loss or damage by fire to the amount of five thousand dollars, on his three-story brick building, located in block No. 1, lot No. 5, levee known as City Missouri, and that the defendant, for the consideration aforesaid, did promise and agree to make good unto plaintiff, his executors, administrators, and assigns all such immediate loss and damage, not exceeding in amount the sum aforesaid, as should happen by fire to the property above specified, from the first day of June, eighteen hundred and sixty-one, at noon, until the first day of June, eighteen hundred and sixty-two, at noon; the said loss or damage to be estimated according to the true and actual cash value of the property at the time the same should happen, and to be paid within sixty days after the notice and proof thereof, made to defendant's office in accordance to the conditions [to the conditions] annexed to said policy as hereinafter stated. That by said policy it was provided that defendant should not be liable to make good any loss or damage by fire which might happen or take
3 place by means of any invasion, insurrection, riot or civil commotion, or of any military, or usurped power, or any loss by theft, at or after a fire. That said defendant should not be liable, if plaintiff had at the time said insurance was made any other insurance on said property against loss by fire, unless the said other insurance should be notified to defendant, and mentioned in and endorsed on said policy. That if the plaintiff should at any time thereafter, make any other insurance on said property, and should not with all reasonable diligence give notice thereof to defendants and have the same endorsed on said policy, or otherwise acknowledged by defendant, then said policy should be void and none effect. That if any subsequent insurance should be made on said property which, with the sum already insured, should, in the opinion of the defendant, amount to an over insurance, defendant reserve, the right of cancelling said policy, by paying to plaintiff the unex-

pired premium, pro rata. That if any other insurance upon said property should be made, whether prior or subsequent, plaintiff should not in case of loss, or damage, be entitled to demand or recover of defendant any greater portion of the loss or damage sustained than the amount in said policy should bear to the whole amount insured on said property. That if said property should at any time after the making of said policy, and during the continuance thereof, be
4 appropriated, applied or used to or for the purpose of carrying on or exercising therein any trade, business, or vocation denominated hazardous, or specified in the memorandum of special hazards in the terms and conditions aforesaid, denominated hazardous, then and from henceforth, so long as the same should be so appropriated, applied, used or occupied, said policy should cease and be of no force or effect. That said policy should not apply to or cover any books of account with securities, deeds or other evidences of title to lands, nor to bonds, bills, notes or evidences of debt, nor to money or bullion. And that said policy should be excepted with and in reference to the conditions thereto annexed, which are to be used and resorted to in order to explain the rights and obligations of the parties to said policy in all cases not therein otherwise specially provided for. A copy of which conditions as annexed to said policy is herewith filed.

Plaintiff further states, that on said first day of June, eighteen hundred and sixty-one, and before said policy was delivered to him, he paid the said premium of one hundred dollars to defendant; and plaintiff further states, that he duly kept, and performed all covenants and stipulations in said policy, and the conditions thereto annexed to be by him kept and performed; and that on the twenty-third day of March, eighteen hundred and sixty-two, and between the
5 said first day of June, eighteen hundred and sixty-one, at noon, and the said first day of June, eighteen hundred and sixty-two, at noon, said property so insured in said policy, was, without any fault or negligence on the part of the plaintiff, by one of the perils insured against [against] in such a policy, to wit, fire, wholly burned up and consumed; plaintiff says, that the actual cash value of the loss or damage to the said property, by reason of said fire, was at the time the same happened, the sum of five thousand one hundred and thirty-four dollars.

Plaintiff further says, that immediately after the insured property was so consumed by fire, to wit, on the twenty-seventh day of March, eighteen hundred and sixty-two, he gave notice thereof to Messrs. Baylis and Hicks, agents of said defendant, at Kansas City, Missouri, and did, as soon thereafter as possible, to wit, on the fifth day of April, eighteen hundred and sixty-two, delivered to said agents of said defendant at the place last aforesaid, a particular account of the loss or damage done to said insured property by said fire, signed by him, plaintiff, and verified by his oath, declairing said amount to be true and just, showing what other insurance had been made on said property; what was the whole cash value of the property insured; what was his interest therein; in what manner the property insured

was occupied at the time of loss; and when and how the fire
6 originated, so far as he knew. And plaintiff further says, that in said particular account so rendered, plaintiff, amongst other things, stated that in addition to the sum insured by said defendant, there was one other insurance on his, plaintiff's brick and frame warehouse, being the same specified in defendant's policy, occupied by the assured for that purpose, situated on said lot No. 5, in Block No. 1, on the levee in Kansas City, Missouri. And plaintiff further states, that at the time he effected said insurance with defendant, he did not know, nor did he at any time thereafter, until said insured property had been burned, know that there was any other such insurance on the property to which defendant's policy attached. That at the same time he did procure and deliver to said agents a certificate under the hand and seal of D. S. Shonse, a notary public, who resided near to the place of the fire that consumed the said insured property than any other magistrate, notary public, or commissioner of deeds, who stated therein that he was not concerned in said loss as a creditor or otherwise; that he was not related to plaintiffs; that he had examined the circumstances attending said fire and loss or damage alleged; that he was acquainted with the character and circumstances of plaintiff; and that he verily believed that he had by misfortune, and without fraud or evil practice, sustained loss and damage
7 on the said insured property to the amount of five thousand one hundred and thirty-four dollars. That by reason of the premises the insured property then and there became wholly lost to the plaintiff. Of all which said several premises defendant afterwards, to wit, on the day and year last aforesaid, had notice, and was then and there requested by plaintiff to pay him the sum of five thousand dollars, so by him insured as aforesaid, and which said sum of five thousand dollars the defendant ought to have paid plaintiff, according to the form and effect of said policy of insurance, and said promise and undertaking so made by defendant as aforesaid. Plaintiff further says, that on said fifth day of April, eighteen hundred and sixty-two, and after said particular account had been so delivered as aforesaid, defendant, by said agents, with a full knowledge that said insurance of three thousand dollars had been made as aforesaid, with the intent to ascertain the true amount of loss or damage that was done to said brick warehouse by reason of said fire, as well as to ascertain whether defendant would elect within a reasonable time to rebuild said brick warehouse or pay plaintiff the amount of loss or damage when so ascertained, in money, together with plaintiff, did mutually agree upon A. B. Cross, and Louis Deardorf, two disinterested persons as appraisers, to ascertain and appraise the true
8 value and amount of loss or damage to said insured brick warehouse by reason of said fire, who being first duly sworn for that purpose, did on the premises, on the day and year last aforesaid, assess and appraise the loss and damage done to said brick warehouse by reason of said fire, to the sum of five thousand one hundred and thirty-four dollars, and made a written detailed report thereof, which is herewith filed, and that the expense of said appraisement amounted

to the sum of dollars, one half of which was paid by plaintiff, and the other by defendant. All of which actings and doings of said appraisers said agents of defendants had notice on the day and year last aforesaid.

And plaintiff further says, that defendant did not within sixty days after the said notice and proofs and certificates were so presented to the agents of said defendants as aforesaid, pay plaintiff said sum of five thousand dollars, or any part thereof, nor has said defendant at any time since paid plaintiff said sum of five thousand dollars, or any part thereof, although often requested so to do.

Wherefore, plaintiff says that an action hath accrued to have and demand of defendant said sum of five thousand dollars with interest thereon from said fifth day of April, eighteen hundred and
9 sixty-two, and for which sum plaintiff asks judgment.

And plaintiff further says, that on or about the tenth day of June, eighteen hundred and sixty-two, he commenced a suit on said policy of insurance so made by defendant as aforesaid, in the Kansas City Court of Common Pleas, in Jackson County, Missouri, which said suit was, on or about the first day of June, eighteen hundred and sixty- , dismissed. All of which will more fully appear by the transcript of the proceedings in said suit in the said Common Pleas Court herewith filed.

HICKS & BUCHANAN,
Attorneys for Plaintiffs.

Jesse Riddlesbarger, plaintiff, makes oath and says the above petition and the matters therein as stated, he believes to be true.

J. RIDDLESBARGER.

Subscribed and sworn to before me, this 26th day of July, A. D. 1864.

Attest:

LEON J. PAPIN, *Clerk.*

Thereupon, the following summons issued, to wit:

Summons.

COUNTY OF ST. LOUS, *ss:*

The State of Missouri to the sheriff of St. Louis county, greeting:

We command you to summon the Hartford Insurance Company to appear before the judge of our Court of Common Pleas, on the first day of the next term thereof, to be held in the City of St.
10 Louis, within and for the county of St. Louis, on the third Monday of November, eighteen hundred and sixty-four, then and there to answer the complaint of Jesse Riddlesbarger, as set forth in the annexed petition, and have you then and there this writ.

Witness Leon J. Papin, clerk of our said court, with the seal thereof hereunto affixed, at office in the city of St. Louis, this twenty-seventh day of July, in the year of our Lord eighteen hundred and sixty-four.

[L. S.] LEON J. PAPIN, *Clk.*

Sheriff's return.

To the foregoing writ the sheriff made the following return, to wit:

Executed this writ in the county of St. Louis, on the twenty-ninth day of July, eighteen hundred and sixty-four, by delivering a copy of the writ, as furnished by the clerk, to W. Henry Holland, agent of the Hartford Fire Insurance Company.

JOHN C. VOGEL, *Sh'ff.*
By O. S. FULLER, *Dep'y.*

Bond filed and approved.

And afterwards, to wit, on Saturday, November twenty-sixth, eighteen hundred and sixty-four, the following further proceedings were had, to wit:

Thereupon the said Hartford Fire Insurance Company files a bond with Edward Morrison, as principal, and John R. Shepley, as security, in the sum of two hundred dollars, which is approved by the court.

11 *Order of Court remov'g said cause, &c.*

And afterwards, on Friday December 23, 1864, the following further proceedings were had, to wit:

Now, at this day came the said parties, by their respective attorneys, and submit to the court the motion of the Hartford Fire Insurance Company, for an order directing the removal of said cause to Circuit Court of the United States for the district of Missouri, and the court having heard the arguments of counsel, and being sufficiently advised in and of the premises, doth order that said cause be removed to the said Circuit Court of the United States for the district of Missouri.

Motion for renewal.

Which motion for renewal to the United States Circuit Court is in the words and figures following, to wit:

And now comes the said Hartford Fire Insurance Company, defendant herein, and moves the said court that said court make an order in their cause to the Circuit Court of the United States for the district of Missouri, and the said defendant is a corporation, incorporated under the laws of the State of Connecticut, and has its principal place of business in Hartford, in said State of Connecticut, and is a citizen thereof, and that the stockholders of said corpora-
12 tion are not citizens of the State of Missouri. The said defendant further states, that the matter in controversy in said suit exceeds the sum of five thousand dollars.

THE HARTFORD FIRE INSURANCE COMPANY.
By GLOVER & SHEPLEY, *their Att'ys.*

STATE OF MISSOURI, *County of St. Louis, ss:*

Edward Morrison, agent of said defendant, being duly sworn on his oath states, that the above petition and the matters and things, as herein stated are true.

EDWARD MORRISON.

Sworn to and subscribed before me, this 26 day of November, 1864.

Bond.

And the bond for removal is in the words and figures following, to wit:

Know all men by these presents, that we, Edward Morrison, as principal, and John R. Shepley, as security, are held and firmly bound unto Jesse Riddlesbarger, in the full and just sum of two hundred dollars, to the payment of which, well and truly to be made, we hereby bind ourselves, our heirs, executors, and administrators, firmly by these presents. Sealed with our seals, and dated this twenty-sixth day of November, eighteen hundred and sixty-four.

The condition of the above obligation is such, that whereas, the Hartford Insurance Company has this day filed their petition
13 in the St. Louis Court of Common Pleas, in a certain suit therein pending, wherein Jesse Riddlesbarger is plaintiff, and said company is defendant, for a removal of the said cause from said court to the Circuit Court of the United States for the district of Missouri. Now, if the said Hartford Insurance Company shall, on the first day of the next session of the said Circuit Court of the United States for the district of Missouri, enter and file in said Circuit Court of the United States copies of the process and proceedings in said suit, then this obligation to be void, otherwise to be in full force and virtue.

EDWARD MORRISON. [SEAL.]
JOHN R. SHEPLEY. [SEAL.]

Approved by court, November 26th, 1864.
Attest: LEON J. PAPIN, *Cl'k.*

Amended petition.

On the 23d December, 1864, the following amended petition was filed, to wit:

Plaintiff, in his amended petition states, that heretofore, to wit: on the first day of June, eighteen hundred and sixty-one, defendant, by her certain written policy of insurance (which is now here to the court shown) in consideration that plaintiff would pay defendant one hundred dollars premium, undertook and faithfully promised him, and did insure him in manner following, that is to say: against loss or damage by fire, to the amount of five thousand dollars on his three story
14 brick building, located in block number one, lot number five, levee, Kansas City, Missouri. And the defendant, for the

consideration aforesaid, did promise and agree to made good unto plaintiff, his executors, administrators and assigns, all such immediate loss or damage, not exceeding in amount the sum aforesaid, as should happen to the property above specified, from the first day of June, eighteen hundred and sixty-one, at noon, until the first day of June, eighteen hundred and sixty-two, at noon. The said loss or damage to be estimated according to the true cash value of the property at the time the said loss or damage should happen, and to be paid within sixty days after notice and proof thereof made to defendant's office, in accordance to the conditions annexed to said policy, as hereinafter stated. That by said it was provided, that said defendant should not be liable to make good any loss or damage by fire which might happen or take place, by means of any invasion, insurrection, riot or civil commotion, or of any military or usurped power, or any loss by theft at or after a fire. That said defendant should not be liable if plaintiff had at the time said insurance was made, any other insurance on said property against loss by fire, unless the said other insurance should be notified to said defendant, and mentioned in and endorsed on said policy.

15 That if the plaintiff should, at any time thereafter, make any other insurance on said property, and should not with all reasonable diligence give notice thereof to defendant, and have the same endorsed on said policy, or otherwise acknowledged by defendant, then said policy should be void and of none effect. That if any subsequent insurance should be made on said property, which, with the sum already insured, should, in the opinion of defendant, amount to an over insurance, defendant reserved the right of cancelling said policy by paying to plaintiff the unexpired premium, pro rata. That if any other insurance upon said property by any other policy should be made, whether prior or subsequent, plaintiff should not, in case of loss or damage be entitled to demand or recover of defendant any greater portion of the loss or damage sustained, than the amount in said policy should be to the whole amount insured on said property.

That if said property should, at any time after the making of said policy, and during the continuance thereof, be appropriated, applied or used to, or for the purpose of carrying on or exercising therein any trade, business or vocation denominated hazardous or extra hazardous, or included in the memorandum of special hazards, then and from thenceforth, so long as the same should be so appropriated,

16 applied, used or occupied, said policy should cease, and be no effect or force. That said policy should not apply to or cover any books of accounts; neither securities, deeds or other evidences of titles to lands, nor to bonds, notes, or evidences of debt, nor money or bullion. That said policy should be accepted with and in reference to the conditions thereto annexed, which were to be used and resorted to, in order to explain the rights and obligations of the parties to said policy in all cases not therein otherwise specially provided for. A copy of which conditions annexed to said policy is herewith filed. Plaintiff further says, that on the said first day of June, eighteen hundred and sixty-one, and before said policy was

delivered to him, he paid said premium of one hundred dollars to defendant. And plaintiff further says, that he duly kept and performed all the covenants and stipulations in said policy and conditions thereto annexed to be by him kept and performed.

And plaintiff avers, that said contract of insurance was made and entered into in the State of Missouri; that is to say, at Kansas City, in the State of Missouri, the place where said insured property was situated. That said contract for said insurance was made at said Kansas City, with Messrs. Bayles & Hicks, who at the date and delivery of said policy to plaintiff, were the agents of defendant,
and residents of said Kansas City. Plaintiff further states,
17 that on the twenty-third day of March, eighteen hundred and sixty-two, said property, so insured in said policy, was, without any fault or negligence on the part of plaintiff, by one of the perils insured against in said policy, to wit, fire, whole burned up and consumed.

Plaintiff says, that the actual cash value of the loss or damage to the said property, by reason of said fire, was, at the time the same happened, the sum of five thousand one hundred and thirty-four dollars.

Plaintiff further states, that immediately after the insured property was so consumed by fire, to wit, on the twenty-seventh day of March, eighteen hundred and sixty-two, he gave notice thereof to said Baylis & Hicks, agents of said defendant at Kansas City, Missouri; and did as soon thereafter as possible, to wit, on the first day of April, eighteen hundred and sixty-two, deliver to said agents of defendant, at the place aforesaid, a particular account of the loss or damage done to said property by said fire, signed by him, plaintiff, and verified by his oath, declaring said account to be true and just—showing what other insurance had been made on said property; what was the whole cash value of the property insured what was his interest therein; in what manner
the property insured; was occupied at the time of the loss, and when
18 and how the fire originated, so far as he knew. And plaintiff says, that in said particular account so rendered, he, amongst other things, stated that in addition to the sum insured by said defendant, there was one other insurance on his, plaintiff's, brick and frame houses, (the said brick warehouse being the same specified in defendant's policy,) occupied by the assured for that purpose, situated on said lot, No. 5, in block No. 1, on the levee, Kansas City, Missouri. And plaintiff further states that at the time he effected said insurance with defendant he did not know, nor did he at any time thereafter, until said insured property had been burned, know that there was any other such insurance on the property to which defendant's policy attached. That at the same time he did promise and deliver to said agents of defendant a certificate, under the hand and seal of D. L. Shouse, a notary public, who resided nearer to the place of said fire that consumed the said insured property than any other magistrate, notary public or commissioner of deeds, who stated therein that he was not concerned in said loss as a creditor or otherwise; that he was not related to plaintiff; that he had examined attentively the fire and

loss or damage alleged; that he was acquainted with the character and circumstances of the plaintiff; and that he verily believed he had by misfortune, and without fraud or evil practice, sustained
19 loss and damage on the said insured property to the amount of five thousand one hndred and thirty-four dollars.

Plaintiff further says, that on said fifth day of April, eighteen hundred and sixty-two, and after said particular account had been so delivered, as aforesaid, defendant, by said agents, with a full knowledge that said insurance of three thousand dollars had been so made, as aforesaid, with the intent to ascertain the true amount of loss or damage that was done to said brick warehouse by reason of said fire, as well as to ascertain whether defendant would elect, within a reasonable time, to rebuild said brick warehouse, or pay plaintiff the amount of loss or damage, when so ascertained, in money, together with the plaintiff, did mutually agree upon A. B. Cross and Louis Deardorff, two disinterested persons, as appraisers, to ascertain and appraise the true amount of loss or damage to said brick warehouse by reason of such fire; who, being first duly sworn for that purpose, did on the premises, on the day and year last aforesaid, assess and appraise the loss or damage to said insured brick warehouse, by reason of said fire, to the sum of five thousand one hundred and thirty-four dollars, and made a written detailed report thereof, which is herewith filed.

And plaintiff further says, that defendant did not within sixty
20 days after the said notice and proofs and certificates were so presented to the agents of said defendants, as aforesaid, pay plaintiff said sum of five thousand dollars, or any part thereof, though often requested so to do. Wherefore, plaintiff says, that an action hath accrued to plaintiff, to have and demand of defendant said sum of five thousand dollars, with interest thereon from the twenty-seventh day of March, eighteen hundred and sixty-two, for which and costs, he asks judgment.

And plaintiff further says, that on or about the tenth day of June, eighteen hundred and sixty-two, he commenced an action on said policy of insurance, so made by defendant, as aforesaid, in the Kansas City Court of Common Pleas, in Jackson County, Missouri; which said suit was on or about the first day of June, eighteen hundred and sixty-four, dismissed. All of which will more fully appear by a transcript of the proceedings in said suit in said Common Pleas Court, herewith filed.

HICKS & BUCHANAN,
Att'ys for Plaintiff.

Jesse Riddlesbarger makes oath and says, the above amended petition, and the matters therein as stated, he believes to be true.

J. RIDDLESBARGER.

Subscribed and sworn to before me, this seventeenth day of December, A. D. 1864. LEON J. PAPIN, *Clerk.*

21 STATE OF MISSOURI, *County of St. Louis, ss:*

I, Leon J. Papin, Clerk of the St. Louis Court of Common Pleas, within and for the county aforesaid, do certify the above and foregoing to be a full, true and complete transcript of the record and proceedings in the above-entitled cause, as fully as the same remains in my office.

In witness whereof I hereto set my hand, and affix the seal of said court at office, in the city of St. Louis, this ninth day of January, eighteen hundred and sixty-five.

[SEAL.] LEON J. PAPIN, *Clerk.*

[5-cent U. S. revenue stamp.]

And at a regular stated term of this Circuit Court, begun and holden in the city of St. Louis, in said district, of Monday, the third day of April, in the year eighteen hundred and sixty-five, the following proceedings took place in this, on Monday, the tenth day of April, in said year, to wit:

Filing of Demurrer and motion to dismiss the case.

(Removed from St. Louis Court of Common Pleas.)

JESSE RIDDLESBARGER, plaintiff,
agst.
THE HARTFORD FIRE INSURANCE CO., defendant.

This day come the parties, by attorneys, and the attorney for defendant, by consent, files his demurrer to the proceedings as certified herein, and the attorney for plaintiff, also by consent,
22 files his motion to dismiss this case, and remand the same to the Saint Louis Court of Common Pleas, from whence it came, for the reasons and causes set forth in said motion.

Which demurrer filed herein is in the words and figures following, to wit:

Demurrer.

In the Circuit Court of the United States for the districts of Missouri.

JESSE RIDDLESBARGER
vs.
THE HARTFORD INSURANCE COMPANY.

DISTRICTS OF MISSOURI, *ss:*

And now comes the said defendant and says, that the paper writing in which is stated the cause of action in this suit, is not sufficient in law for the said plaintiff to have and maintain his aforesaid action thereof against the defendant, and said defendant is now bound by law to answer the same, and this he is ready to verify, therefore, he

prays judgment, &c. And the said defendant for causes of demurrer, thereto states that the said paper writing is in the form of a bill in chancery, and not of a declaration at common law, and that the suit is a suit at common law; that the said paper writing is not in the form of any pleading recognized by the rules and practice of this court in like cases; that said paper writing is not in a form in which it can be pleaded thereto by defendant, in any manner recognized by the practice and rules of this court.

(Signed) GLOVER & SHEPLEY.

23 Which motion to dismiss filed by plaintiff herein, is in the words and figures following, to wit:

Motion to dismiss.

JESSE RIDDLESBARGER, plaintiff,
against
HARTFORD INSURANCE COMPANY, defendant.

And said plaintiff, by his attorney, comes and moves the court here, to dismiss the case from the docket, and remand the same to the court from whence it came, for the reason that this court has not jurisdiction of the cause, and cannot proceed to try the same.

(Signed) HICKS & BUCHANAN,
Att'ys for Plaintiff.

And at said regular stated term of this Circuit Court, begun and holden as aforesaid, the following further proceedings took place in this case, on Tuesday, the eleventh day of April, in said last mentioned year, to wit:

Motion to dismiss overruled, and demurrer sustained.

(Removed from St. Louis Court of Common Pleas.)

JESSE RIDDLESBARGER, plaintiff,
agst.
THE HARTFORD FIRE INSURANCE CO., defendant.

This day come the parties, by attorneys, and the court having examined the motion to dismiss this case from the docket of this court, and to remand the same to the Saint Louis Court of Common Pleas, and being advised in relation thereto, now orders that said motion be, and the same is hereby overruled, and the questions
24 of law arising upon the demurrer filed herein by attorney for defendant, being argued and submitted to the court; and the court being advised of and concerning the same, is of opinion, that the law is for the defendant, on said demurrer, and in accordance with such opinion, now orders that said demurrer be and the same is hereby sustained.

And at said regular stated term of this Circuit Court, begun and

holden, as aforesaid, the following further proceedings took place in this case, on Saturday, the twenty-second day of April, in said last mentioned year, to wit:

Filing of declaration and time given to plead.

(Removed from St. Louis Court of Common Pleas.)

JESSE RIDDLESBARGER, plaintiff,
agst.
THE HARTFORD FIRE INSURANCE CO., defendant.

This day comes the plaintiff, by attorney, and files his declaration herein, and the defendant is allowed until the first day of the next term to file his plea thereto, by consent.

Which declaration filed herein, is in the words and figures following, to wit:

In the United States Circuit Court for the district of Missouri.

Declaration.

JESSE RIDDLESBARGER, plaintiff,
vs.
THE HARTFORD FIRE INSURANCE CO., defendant.

The said plaintiff complains of the said defendant of a plea of trespass on the case on promises. For that, whereas, the said
25 plaintiff, on the first day of June, in the year of our Lord one thousand eight hundred and sixty-one, that is to say, at the district aforesaid, caused to be made a certain writing or policy of insurance purporting thereby and containing therein, that he, the said plaintiff, did make assurance and caused himself to be insured, that is to say: The Hartford Fire Insurance Company, of Hartford, Connecticut, in consideration of one hundred dollars, to them paid by the assured hereinafter named, the receipt whereof is hereby acknowledged, do insure J. Riddlesbarger, Kansas City, Mo., against loss or damage by fire, to the amount of five thousand dollars, on his three story brick building, located in block No. 1, lot No. 5, levee, Kansas City, Mo. Building is covered with tin, has two tenants, has frame addition in rear, which is not included in this policy. This company has in policy No. 24, insurance on goods in this building, to the amount of two thousand dollars. For further description, see survey No. 29, now on file in the office of this company.

And the Hartford Fire Insurance Company above named, for the consideration aforesaid, doth hereby promise and agree to make good unto the said assured, his executors, administrators and assigns, all such immediate loss or damage, not exceeding in amount the sum insured, as shall happen by fire to the property, as above specified,
from the first day of June, one thousand eight hundred and
26 sixty-one (at noon,) unto the first day of June, one thousand eight hundred and sixty-two (at noon;) the said loss or damage

to be estimated according to the true and actual cash value of the property at the time the same shall happen, and to be paid within sixty days after notice and proof thereof by the assured, and received at this office, according to the conditions annexed to this policy. Provided always, and it is hereby declared that this company shall not be liable to make good any loss or damage by fire which may happen or take place by means of any invasion, insurrection, riot or civil commotion, or of any military or usurped power, or any loss by theft at or after a fire. And provided further, that in case the assured shall have already any other insurance against loss by fire on the property hereby insured, and not notified to this company, and mentioned in or endorsed upon this policy, then this insurance shall be void and of no effect. And if the said assured or his assigns shall hereafter make any other insurance on the same property, and shall not with all reasonable diligence give notice thereof to this company, and have the same endorsed on this instrument, or otherwise ackowledged by them in writing, this policy shall cease and be of no further effect. And if any subsequent insurance should be made upon the property hereby insured, which, with the sum
27 already insured, should, in the opinion of the said Hartford Insurance Company, amount to an over insurance, said company reserve to themselves the right of cancelling this policy, by paying to the assured the unexpired premium pro rata. And in case of any other insurance upon the property hereby insured, whether prior or subsequent to the date of this policy, the assured shall not, in case of loss or damage, be entitled to demand or recover of this company any greater portion of the loss or damage sustained than the amount hereby insured shall bear to the whole amount insured on the said property.

And it is agreed and declared to be the true intent and meaning of the parties hereto, that in case the above-mentioned premises shall at any time after the making, and during the continuance of this insurance, be appropriated, applied or used to or for the purpose of carrying on or exercising therein, any trade, business or vocation denominated hazardous or extra hazardous, or specified in the memorandum of special hazards in the terms and conditions annexed to this policy; or for the purpose of storing, using or vending therein any of the articles, goods or merchandise, in the terms and conditions aforesaid, denominated hazardous or extra hazardous, or included in the memorandum of special hazards, unless herein otherwise specially provided for, or hereafter agreed to by this company in writing, and added to or endorsed upon this policy; then, and from
28 thenceforth, so long as the same shall be so appropriated, applied, used or occupied, these presents shall cease and be of no force or effect. And it is moreover declared that this insurance is not intended to apply to or cover any books of account, written securities, deeds or other evidences of titles to lands, nor to bonds, bills, notes or other evidences of debt, nor to money or bullion. And that this policy is made and accepted in reference to the conditions hereto annexed, which are to be used and resorted to in order to explain

the rights and obligations of the parties hereto, in all cases not herein otherwise specially provided for. This policy shall not be valid until countersigned by the duly authorized agent of said Hartford Fire Insurance Company at Kansas City, Mo.

In witness whereof, the Hartford Fire Insurance Company have caused these presents to be signed by their president and attested by their secretary, in the city of Hartford, and State of Connecticut.

Attested:

TIM'O. C. ALLYN, *Secretary.*
H. HUNTINGTON, *President.*

Countersigned at Kansas City, Mo., this 1st day of June, 1861.
BALES & HICKS, *Agents.*

29 As by the said writing or policy of insurance more fully appears, of which said writing or policy of insurance, the said defendant afterwards, to wit, on the day and year aforesaid, at the district aforesaid, had notice, which said writing or policy of insurance being so made, as aforesaid, afterwards, that is to say, on the day and year aforesaid, at the district aforesaid, in consideration that the said plaintiff at the special instance and request of the said defendant, had then and there paid to the said defendant a large sum of money, that is to say, the sum of one hundred dollars, as a premium or reward for the insurance of a large sum of money, that is to say, the sum of five thousand dollars, of and upon said brick warehouse, in the said writing or policy of insurance mentioned, and had also then and there undertaken, and to the said defendant faithfully promised to perform and fulfil all things in the said writing or policy of insurance contained, on the part and behalf of the assured to be performed and fulfilled; the said defendant undertook and to the said plaintiff then and there faithfully promised that defendant would become an assurer to the said plaintiff, of and upon the said brick warehouse in the said writing or policy of insurance mentioned, and that defendant would perform and fulfill all things in the said writing or policy of insurance on the part and behalf of the said defendant to be performed and fulfilled, as
30 such assurer to the said plaintiff, for the said sum of five thousand dollars, according to the form and effect of said writing or policy of insurance; and the said defendant then and there became an assurer to the said plaintiff, of and upon the said brick warehouse in the said writing or policy of insurance mentioned, and then and there subscribed the said writing or policy of insurance as such assurer for the said sum of five thousand dollars; and which policy was then and there countersigned by defendant's agents, Messrs. Baylis & Hicks, at said Kansas City. And the said plaintiff in fact says, that the said brick warehouse in the said writing or policy of insurance mentioned, that is to say, on the 23d day of March, 1862, was wholly burned, consumed and destroyed by fire, and thereby became and was rendered of no use or value and was wholly lost to plaintiff.

And plaintiff further says, that forthwith, that is to say, on the 24th day of March, 1862, at the district aforesaid, he gave notice of the burning, consuming and destroying of said brick warehouse to the said Balis & Hicks, agents of said defendant, and as soon thereafter as possible, to wit, on the 7th day of April, 1862, at the district aforesaid, he did deliver to said Balis & Hicks, agents as aforesaid, a particular account of the loss or damage occasioned by such burning, consuming and destroying by fire, of said brick warehouse,
31 signed with his own hand, with his affidavit thereto annexed, declaring said amount to be true and just, showing that other insurance had been made on said brick warehouse, and containing a copy of the written portion of said policy, and of all other policies upon the said property; what was the cash value of the said brick warehouse insured; what was his interest therein; in what general manner the said brick warehouse was occupied at the time of the loss; who were the occupants of said brick warehouse, and when, and how the fire originated, so far as he knew or believed.

Plaintiff further says, that on the day and year last aforesaid, at the district aforesaid, he produced and gave to said agents of said defendant a certificate of Daniel S. Shonse, a notary public, who was not concerned in the loss as a creditor, or otherwise, or related to the assured, stating that he had examined the circumstances attending the fire; that he was and is acquainted with the character and circumstances of the assured; that he verily believed that he has by misfortune, and without fraud or evil practice, sustained a loss or damage by the burning, consuming and destroying of said brick warehouse, of five thousand dollars; and so the plaintiff in fact saith the loss or damage to said building by reason of the burning and consuming thereof, was and is the sum of five thousand one hun-
32 dred and thirty-four dollars.

And plaintiff further says, that on the 7th day of April, 1862, at the district aforesaid, and after such notice, and after the delivery of said particular account to defendant's agent as aforesaid, and after producing and delivering said certificate of said notary to the said agents of said defendant, J. B. Cross and Lewis Deardorff, two disinterested appraisers, mutually agreed upon by plaintiff and the agents of defendant for that purpose, did then and there proceed to ascertain the loss or damage sustained by plaintiff by the burning, consuming and destroying of said brick warehouse; and did ascertain and report the same in writing to be five thousand one hundred and thirty-four dollars, of which said appraisement and written report thereof, defendant afterward, to wit, on the day and year last aforesaid, at the district aforesaid, had notice and was furnished with a copy thereof.

Plaintiff further saith, that although more than sixty days have elapsed since he furnished defendant with all the preliminary proofs, that by said policy and the conditions thereto annexed, he was bound to furnish, yet that defendant hath not as yet paid said plain-
33 tiff said sum of five thousand dollars, or any part thereof, although often requested so to do. Wherefore the said plain-

tiff says, that he is injured and hath sustained damage to the amount of six thousand five hundred dollars, and therefore he brings his suit, &c.

And whereas, also the said plaintiff heretofore, to wit, on the day and year first aforesaid, at the district aforesaid, caused to be made a certain other writing or policy of insurance purporting thereby and containing therein that he the said plaintiff, did make assurance and caused himself to be assured, that is to say: The Hartford Fire Insurance Company, of Hartford, Connecticut, in consideration of one hundred dollars to them paid by the assured hereinafter named, the receipt whereof is hereby acknowledged, do insure J. Riddlesbarger, Kansas City, Mo., against loss or damage by fire to the amount of five thousand dollars, on his three story brick building, located in block No. 1, lot No. 5, levee, Kansas City, Mo. Building is covered with tin, has two tenants, has frame addition in rear, which is not included in this policy. This company has in policy No. 24, insurance on goods in this building to the amount of two thousand dollars. For further description; see survey No. 29, now on file in the office of this company.

And the Hartford Fire Insurance Company above named, for the consideration aforesaid, doth hereby promise and agree to make
34 good unto the said assured, his executors, administrators and assigns, all such immediate loss or damage, not exceeding in amount the sum insured, as shall happen by fire to the property as above specified, from the first day of June, one thousand eight hundred and sixty-one, (at noon,) unto the first day of June, one thousand eight hundred and sixty-two, (at noon;) the said loss or damage to be estimated according to the true and actual cash value of the property at the time the same shall happen; and to be paid within sixty days after notice and proof thereof by the assured, and received at this office, according to the condition annexed to this policy. Provided always, and it is hereby declared that this company shall not be liable to make good any loss or damage by fire, which may happen or take place by means of any invasion, insurrection, riot, or civil commotion, or of any military or usurped power, or any loss by theft at or after a fire. And provided further that in case the assured shall have already any other insurance against loss by fire on the property hereby insured, and not notified to this company and mentioned in or endorsed upon this policy, then this insurance shall be void and of no effect. And if the said assured or his assigns, shall hereafter make any other insurance on the same property, and shall not with all reasonable diligence give notice thereof to this company, and
35 have the same endorsed on this instrument, or otherwise acknowledged by them in writing, this policy shall cease and of no further effect.

And if any subsequent insurance should be made upon the property hereby insured which with the sum already insured should, in the opinion of the said Hartford Insurance Company, amount to an over insurance, said company reserve to themselves the right of cancelling this policy by paying to the assured the unexpired pre-

mium pro rata. And in case of any other insurance upon the property hereby insured, whether prior or subsequent to the date of this policy, the assured shall not, in case of loss or damage, be entitled to demand or recover of this company any greater portion of the loss or damage sustained than the amount hereby insured shall bear to the whole amount insured on the said property. And it is agreed and declared to be the true intent and meaning of the parties hereto, that in case the above-mentioned premises shall, at any time after the making and during the continuance of this insurance, be appropriated, applied, or used to or for the purpose of carrying on or exercising therein any trade, business or vocation denominated hazardous or extra hazardous, or specified in the memorandum of special hazards in the terms and conditions annexed to this policy, or for the purpose of storing or vending therein any of the articles,
36 goods, or merchandize, in the terms and conditions aforesaid, denominated hazardous or extra hazardous, or included in the memorandum of special hazards, unless herein otherwise specially provided for, or hereafter agreed to by this company, in writing, and added to or endorsed upon this policy, then and from thenceforth, so long as the same shall be so appropriated, applied, used or occupied, these presents shall cease, and be of no force or effect. And it is moreover declared that this insurance is not intended to apply to or cover any books of account, written securities, deeds, or other evidences of title to lands, nor to bonds, bills, notes, or other evidences of debt, nor to money or bullion. And that this policy is made and accepted in reference to the conditions hereto annexed, which are to be used and resorted in order to explain the rights and obligations of the parties hereto in all cases not herein otherwise specially provided for. This policy shall not be valid until countersigned by the duly authorized agent of said Hartford Fire Insurance Company, at Kansas City, Mo. As by the said writing or policy of insurance more fully appears, of which said writing or policy of insurance the said defendant afterwards, to wit, on the day and year aforesaid at the district aforesaid, had notice; which said writing or policy of insurance being so made as aforesaid, afterwards, that is to
37 say, on the day and year aforesaid, at the district aforesaid, in consideration that the said plaintiff, at the special instance and request of the said defendant had then and there paid to the said defendant a large sum of money, that is to say, the sum of one hundred dollars as a premium or reward for the insurance of a large sum of money, that is to say, the sum of five thousand dollars, of and upon said brick warehouse, in the said writing or policy of insurance mentioned; and had also then and there undertaken and to the said defendant faithfully promised to perform and fulfil all things in the said writing or policy of insurance, contained on the part and behalf of the assured, to be performed and fulfilled, the said defendant undertook and to the said plaintiff then and there faithfully promised that defendant would become an assurer to the said plaintiff, of and upon the said brick warehouse, in the said writing or policy of insurance mentioned; and that defendant would perform and fulfil all things

in the said writing or policy of insurance on the part and behalf of the said defendant, to be performed and fulfilled as such assurer to the said plaintiff for the said sum of five thousand dollars, according to the form and effect of said writing or policy of insurance, and the said defendant then there became an assurer to the said plain-
38 tiff, of and upon the said brick warehouse, in the said writing or policy of insurance mentioned, and then and there subscribed the said writing or policy of insurance as such assurer for the said sum of five thousand dollars, and which policy was then and there countersigned by defendant's agents, at said Kansas City, Messrs. Balis & Hicks. And the said plaintiff in fact says, that the said brick warehouse in the said writing or policy of insurance mentioned, that is to say, on the 23d day of March, 1862, was wholly burned, consumed and destroyed by fire, and thereby became and was rendered of no use or value, and was wholly lost to plaintiff. And plaintiff further says that forthwith, that is to say, on the 24th day of March, 1862, at the district aforesaid, he gave notice of the burning, consuming and destroying of said brick warehouse, to the said Balis & Hicks, agents of said defendant; and as soon thereafter as possible, to wit, on the 7th day of April, 1862, at the district aforesaid he did deliver to said Balis & Hicks, agents as aforesaid, a particular account of the loss or damage occasioned by such burning, consuming and destroying by fire of said brick warehouse, signed with his own hand, with his affidavit thereto annexed, declaring said account to be true and just, showing what other insurance had been made on said brick ware-
house, and containing a copy of the written portion of said
39 policy and of all other policies, upon the said property; what was the cash value of the said brick warehouse insured; what was his interest therein; in what general manner the said brick warehouse was occupied at the time of the loss; who were the occupants of said brick warehouse, and when and how the the fire originated, so far as he knew or believed.

Plaintiff further says, that on the day and year last aforesaid, at the district aforesaid, he produced and gave to said agents of said defendants a certificate of Daniel S. Shonse, a notary public, who was not concerned in the loss as a creditor or otherwise, or related to the assured, stating that he had examined the circumstances attending the fire; that he was and is acquainted with the character and circumstances of the assured; that he verily believed that he has by misfortune, and without fraud or evil practice, sustained a loss or damage, by the burning, consuming, and destroying of said brick warehouse, of five thousand dollars.

And plaintiff further says, that on the day of , 1862, at the district aforesaid, and after such notice, and after the delivery of said particular account to defendant's agents as aforesaid, and after producing and delivering said certificate of said notary to the said agents of said defendant, J. B. Cross and Lewis Deardorff, two disinterested appraisers, mutually agreed upon by plaintiff and the agents
of defendant for that purpose, did then and there proceed to
40 ascertain the loss or damage sustained by plaintiff by the burn-

ing, consuming, and destroying of said brick warehouse; and did ascertain and report the same, in writing, to be five thousand one hundred and thirty-four dollars, of which said appraisement and written report thereof defendant afterward, to wit, on the day and year last aforesaid, at the district aforesaid, had notice, and was furnished with copy thereof.

Plaintiff further says, that although in the said policy of insurance in the said preliminary proofs, mentioned as having been effected by the Messrs. W. A. Chick, J. A. Gregory, and W. S. Gregory, in the Mound City Mutual Fire Insurance Company, of St. Louis, and assigned to plaintiff on the 2d day of February, 1857, it appears that insurance was effected on the brick and frame warehouse situated on said lot No. 5, in said block No. 1, on the levee, in the said city of Kansas, Mo.; yet that the said brick and frame houses are distinct and separate buildings. And that policy, in said preliminary proofs mentioned, was not intended to cover said brick warehouse, but that said brick warehouse was inserted therein by mistake, to wit, at the district aforesaid.

And plaintiff further says, that he had no knowledge in fact that said brick warehouse was included in said policy of insurance in said preliminary proofs mentioned, until after the said brick ware-
41 house was destroyed by fire on the day and year in that behalf first above stated, to wit, at the district aforesaid.

Plaintiff further saith, that although more than sixty days have elapsed since he furnished defendant with all the preliminary proofs that by said policy, and the conditions thereto annexed, he was bound to furnish, yet that defendant hath not as yet paid said plaintiff said sum of five thousand dollars, or any part thereof, although often requested so to do. Wherefore, the said plaintiff says that he is injured and hath sustained damage to the amount of six thousand five hundred dollars, and therefore he brings this suit, &c.

And whereas, also, the said plaintiff heretofore, to wit, on the day and year first aforesaid, at the district aforesaid caused to be made a certain other writing or policy of insurance, purporting thereby and containing therein that he, the said plaintiff did make assurance, and caused himself to be assured; that is to say, the Hartford Fire Insurance Company, of Hartford, Connecticut, in consideration of one hundred dollars to them paid by the assured hereinafter named, the receipt whereof is hereby acknowledged, do insure J. Riddlesbarger, Kansas City, Mo., against loss or damage by fire, to the amount of five thousand dollars, on his three story brick building, located in block No. 1, lot No. 5, levee, Kansas City, Mo; building is covered with tin, has two tenants, has frame addition in rear, which is not included in this policy. This company has in
42 policy No. 24, insurance on goods in this building to the amount of two thousand dollars. (For further description, see survey No. 29, now on file in the office of this company.)

And the Hartford Fire Insurance Company above named, for the consideration aforesaid, doth hereby promise and agree to make good unto the said assured, his executors, administrators, and assigns, all

such immediate loss or damage, not exceeding in amount the sum insured, as shall happen by fire to the property as above specified, from the first day of June, one thousand eight hundred and sixty-one, (at noon,) unto the first day of June, one thousand eight hundred and sixty-two, (at noon,) the said loss or damage to be estimated according to the true and actual cash value of the property at the time the same shall happen, and to be paid within sixty days after notice and proof thereof by the assured and received by this office, according to the condition annexed to this policy: provided always, and it is hereby declared, that this company shall not be liable to make good any loss or damage that may happen or take place by means of any invasion, insurrection, riot, or civil commotion, or of any military or usurped power, or any loss by theft at or after a fire; and provided further, that in case the assured shall have already any other insurance against loss by fire on the property hereby
43 insured, and not notified to this company, and mentioned in or endorsed upon this policy, then this insurance shall be void and of no effect.

And if the assured or his assigns shall hereafter make any other insurance on the same property, and shall not with all reasonable diligence give notice thereof to this company, and have the same endorsed on this instrument, or otherwise acknowledged by them in writing, this policy shall cease and be of no further effect. And if any subsequent insurance shall be made upon the property hereby insured, which, with the sum already insured, should, in the opinion of said Hartford Insurance Company, amount to an over-insurance, said company reserve to themselves the right of canceling this policy, by paying to the assured the unexpired premium, pro rata. And in case of any other insurance upon the property hereby insured, whether insured prior or subsequent to the date of this policy, the assured shall not, in case of loss or damage, be entitled to demand or recover of this company any greater portion of the loss or damage sustained than the amount hereby insured shall bear to the whole amount insured on the said property.

And it is agreed and declared to be the true intent and meaning of the parties hereto, that in case the above-mentioned premises shall, at any time after the making and during the continuance of this insurance, be appropriated, applied, or used to or for the purpose of car-
44 rying on or exercising therein any trade, business, or vocation denominated hazardous or extra hazardous, or specified in the memorandum of special hazards, in the terms and conditions annexed to this policy, or for the purpose of storing or vending therein any of the articles, goods, or merchandize, in the terms and conditions aforesaid denominated hazardous, or extra hazardous, or included in the memorandum of special hazards, unless therein otherwise specially provided for, or hereafter agreed to by this company, in writing, and added to or endorsed upon this policy, then and from thenceforth, so long as the same shall be so appropriated, applied, used, or occupied, these presents shall cease and be of no force or effect.

And it is morever declared, that this insurance is not intended to apply to or cover any books of account, written securities, deeds, or other evidences of title to lands, nor to bonds, bills, notes, or other evidences of debt, nor to money or bullion; and that this policy is made and accepted in reference to the conditions hereto annexed, which are to be used and resorted to in order to explain the rights and obligations of the parties hereto, in all cases not herein otherwise specially provided for, as by the said writing or policy of insurance more fully appears, of which said writing or policy of insurance the said defendant afterwards, to wit, on the day and year aforesaid,
45 at the district aforesaid, had notice; which said writing or policy of insurance being so made as aforesaid, afterwards, to wit, on the day and year aforesaid, at the district aforesaid, in consideration that the said plaintiff at the special instance and request of the said defendant, had then and there paid to the said defendant a large sum of money, that is to say, the sum of one hundred dollars as a premium or reward for the insurance of a large sum of money, that is to say, the sum of five thousand dollars of and upon said brick warehouse in the said writing or policy of insurance mentioned, and had, also, then and there undertaken, and to the said defendant, faithfully promised to perform and fulfill all things in the said writing or policy of insurance contained on the part and behalf of the assured to be performed and fulfilled, the said defendant undertook, and to the said plaintiff then and there faithfully promised that defendant would become an assurer to the said plaintiff of and upon the said brick warehouse in the said writing or policy of insurance mentioned; and that defendant would perform and fulfill all things in the said writing or policy of insurance on the part and behalf of the said defendant to be performed and fulfilled as such assurer to the said plaintiff, for the said sum of five thousand dollars according to
46 the form and effect of said writing or policy of insurance; and the said defendant then and there became an assurer to the said plaintiff of and upon the said brick warehouse in the said writing or policy of insurance mentioned, and then and there subscribed the said writing or policy of insurance as such assurer for the said sum of five thousand dollars, and which policy was then and there countersigned by defendant's agents at said Kansas City, Messrs. Balis and Hicks. And the said plaintiff in fact says that the said brick warehouse in the said writing or policy of insurance mentioned, that is to say: on the 23d day of March, 1862, was wholly burned, consumed and destroyed by fire, to wit, at the district aforesaid, and thereby became and was rendered of no use or value, and was wholly lost to plaintiff.

And plaintiff further says, that forthwith, that is to say, on the 24th day of March, 1862, at the district aforesaid, he gave notice of the burning, consuming, and destroying of said brick warehouse to the said Balis & Hicks, agents of said defendant, and as soon thereafter as possible, to wit, on the 7th day of April, 1862, at the district aforesaid, he did deliver to said Balis & Hicks, agents as aforesaid, particular account of the loss or damage occasioned by such burning,

consuming and destroying by fire of said brick warehouse, signed with his own hand, with his affidavit thereto annexed, declaring
47 said amount to be true and just, showing what other insurance had been made on said brickware house, and containing a copy of the written portion of said policy, and of all other policies, upon the said property; what was the cash value of the said brick warehouse insured; what was his interest therein; and when and how the fire originated so far as he knew or believed.

Plaintiff further says, that on the day and year last aforesaid, at the district aforesaid, he produced and gave to said agents of said defendant a certificate of Daniel S. Shonse, a notary public, who was not concerned in the loss as a creditor or otherwise, or related to the assured, stating that he had examined the circumstances attending the fire; that he was, and is, acquainted with the character and circumstances of the assured; that he verily believed that he has by misfortune, and without fraud or evil practice, sustained a loss or damage by the burning, consuming and destroying of said brick warehouse, of five thousand dollars.

And plaintiff further says, that on the day of , 1862, at the district aforesaid, and after such notice, and after the delivery of said particular amount to defendant's agents, as aforesaid, and after producing and delivering said certificate of said notary to the said agents of said defendant, J. B. Cross and Lewis Deardorff,
48 two disinterested appraisers, mutually agreed upon by plaintiff and the agents of defendant for that purpose, did then proceed to ascertain the loss or damage sustained by plaintiff by the burning, consuming and destroying of brick warehouse; and did ascertain and report the same in writing to be five thousand one hundred and thirty-four dollars; of which said appraisement and written report thereof defendant afterward, to wit, on the day and year last aforesaid, at the district aforesaid, had notice and was furnished with a copy thereof.

And said plaintiff further says, that afterwards and after the said preliminary proofs had been furnished to defendant's agents, to wit, on the 7th day of April, 1862, at the district aforesaid, the said defendant wholly waived, relinquished, released, and discharged the plaintiff from the observance and the performance of the second condition in said policy mentioned, that is to say, from the observance and performance of the said condition that provides, "that in case the assured shall have already any other assurance against loss by fire on the property hereby insured, and not notified to the said defendant, and mentioned in or endorsed upon said policy, then the insurance should be void and of no effect."

And said plaintiff further says, that in the day and year last aforesaid, and after said preliminary proofs had been furnished as
49 aforesaid, the said defendant wholly waived, relinquished, and released, and discharged the said plaintiff from the observance and performance of one of the conditions contained in the "conditions of insurance referred to in the body of the foregoing policy," that is to say from the observance and performance of the said con-

dition that provides that it shall be stated in the particular account of such loss or damage; "in what general manner the building insured, and the several parts thereof, were occupied at the time of the loss, and who were the occupants of said building."

Plaintiff further saith that although more than sixty days have elapsed since he furnished defendant with all the preliminary proofs that by said policy and the conditions thereto annexed, he was bound to furnish, yet that defendant hath not as yet paid plaintiff said sum of five thousand dollars, or any part thereof, although often requested so to do. Wherefore the said plaintiff says that he is injured and hath sustained damage to the amount of six thousand five hundred dollars, and therefore he brings his suit, &c.

(Signed) HICKS & BUCHANAN.
Att'ys for plaintiff.

And on the twenty-ninth day of September, A. D. eighteen hundred and sixty-five, the following demurrer herein was filed, to wit:

50 In the Circuit Court of the United States for the district of Missouri.

Demurrer.

JESSE RIDDLESBARGER, plaintiff,
vs.
THE HARTFORD FIRE INSURANCE COMPANY, defendant.

And now comes the said defendant and defends the wrong and injury, when, &c., and says that the said declaration, and the several counts thereof, and the matters therein contained in manner and form as the same are above set forth, are not sufficient in law for the said plaintiff to have and maintain his aforesaid action thereof against the said defendant, and said defendant is not bound in law to answer the same. And this he is ready to verify. Wherefore, by reason of the insufficiency of said declaration and the several counts thereof in this behalf, the said defendant prays judgment, and that the plaintiff may be barred from having or maintaining his aforesaid action thereof against said defendant, &c.

(Signed) GLOVER & SHEPLEY.
Att'ys for Def't.

And at a regular stated term of this Circuit Court, begun and holden in the city of St. Louis, on Monday, the second day of October, in the year eighteen hundred and sixty-five, the following proceedings took place in this case on Tuesday, the tenth day of October, in said year, to wit:

Removed from St. Louis Court of Common Pleas.

51 *Demurrer argued and submitted.*

JESSE RIDDLESBARGER, plaintiff,
agst.
THE HARTFORD FIRE INSURANCE CO., defendant.

This day come the parties, by attorney, and the questions of law

arising upon the demurrer filed by the defendant to the 1st, 2d and 3d counts of plaintiff's declaration herein were argued and submitted to the court, which, not being fully advised in the premises, took time to consider of its judgment thereon.

And at said regular stated term of this court, begun and holden as aforesaid, the following further proceedings took place in this case, on Wednesday, the eleventh day of October, in said last mentioned year, to wit:

Removed from St. Louis Court of Common Pleas.

Leave to amend declaration.

JESSE RIDDLESBARGER, plaintiff,
agst.
THE HARTFORD FIRE INSURANCE COMPANY, defendant.

This day come the parties, by attorneys, and the plaintiff, by attorney, asked leave, before any decision or action of the court upon the demurrer herein, to amend the first count of the declaration in this case, which was allowed and said amendment made.

Demurrer overruled as to first count, and sustained as to 2d and 3d counts.

And the questions of law arising upon said demurrer were again submitted to the court, and the court now being fully advised of, and concerning the same, is of opinion that the law is for the plaintiff, as to the questions of law arising upon said demurrer to the
52 first count of said declaration, and in accordance with such opinion now orders that said demurrer be and the same is hereby overruled as to said first count; and as to the questions of law arising upon said demurrer to the second and third counts of said declarations, is of opinion that the law is for the defendant, and in accordance with such opinion, now orders that said demurrer be and the same is hereby sustained as to the said second and third counts.

Leave to amend as to said 3d count, and also leave to plead.

On motion of plaintiff, by attorney, leave is given him to amend the said third count, and on motion of attorney for defendant, leave is given him to plead to the said first count contained in said declaration; and, by consent, it is ordered that this case be now continued until the next term of this court.

And on the thirtieth day of March, in the year eighteen hundred and sixty-six, there was filed in the clerk's office of the U. S. Circuit Court for the district of Missouri, the pleas of defendant, which pleas are in the words and figures following, to wit:

In the Circuit Court of the United States for the district of Missouri.

Pleas.

JESSE RIDDLESBARGER, plaintiff,
vs.
THE HARTFORD FIRE INSURANCE COMPANY, defendant.

And now comes the said defendant and defends the wrong and injury, when &c., and says that it did not undertake and promise in manner and form as said plaintiff has above thereof complained
53 against said defendant, and of this said defendant puts itself upon the country, &c.

And for a further plea in this behalf the said defendant says, that said plaintiff ought not to have or maintain his aforesaid action against said defendant, because it says that it was provided in the policy, set forth and described in the said declaration, and was a part of the conditions therein contained, and forming a part thereof, that no suit or action of any kind against said company for the recovery of any claim upon, under or by virtue of the said policy shall be sustainable in any court of law or chancery unless such suit or action shall be commenced within the term of twelve months next after the loss or damages shall occur, and in case any suit or action shall be commenced against said company after the expiration of twelve months next after such loss or damage shall have occurred, the lapse of time shall be taken and deemed as conclusive evidence against the validity of the claim thereby so attempted to be enforced.

And the said defendant says, that the alleged loss and damage in the said declaration mentioned, occurred more than twelve months before the commencement of this suit, and that no loss or damage by fire occurred to the buildings described in said policy of insurance in said declaration mentioned within the space of twelve months immediately preceding the commencement of this suit.

54 And this defendant is ready to verify. Wherefore the defendant prays judgment, whether said plaintiff ought to have or maintain his aforesaid action thereof against defendant.

(Signed) GLOVER & SHEPLEY,
Att'ys for Def't.

And at a regular stated term of this Circuit Court, begun and holden in the city of St. Louis, on Monday, the first day of October, in the year eighteen hundred and sixty-six, the following proceedings took place in this case, on said first Monday in said year, to wit:

Removed from St. Louis Court of Common Pleas.

Replication filed as to 2d plea of def'ts.

JESSE RIDDLEBARGER, plaintiff,
ag'st
THE HARTFORD FIRE INSURANCE CO.,
defendant.

This day comes the plaintiff, by attorney, and files his replication to the second plea of said defendant hereto filed herein.

Which replication filed herein is in the words and figures following, to wit:

Replication.

JESSE RIDDLESBARGER, plaintiff,
against
THE HARTFORD FIRE INSURANCE COMPANY,
defendant.

Now, at this day, comes said plaintiff, by his attorney, and says, as to the said plea of defendant, secondly above pleaded, the said plaintiff, by reason of anything, by the said defendant, in that plea alleged, ought not to be barred from having and maintaining
55 his aforesaid actions thereof against the said defendant, because he says that within one year next after the said cause of action in the said declaration mentioned accrued, to the said plaintiff, to wit, on the 10th day of June, A. D. 1862, he did commence an action by petition and plea in the Kansas City Court of Common Pleas, in the county of Jackson, in the State of Missouri, that a writ was issued from the clerk's office of said Kansas City Court of Common Pleas, tested on the day and year last aforesaid, directed to the marshal of said Kansas City Court of Common Pleas, commanding him to summon the said Hartford Fire Insurance Company, if it be found in his township, that it be and appear before the judge of the Kansas City Court of Common Pleas, at the court-house, in the city of Kansas, on the 24th day of November, A. D. 1862, then and there to answer the complaint of Jesse Riddlesbarger as set forth in a petition and plea to said writ annexed. And that said marshal afterwards, to wit, on the 14th day of June, A. D. 1862, returned said writ duly served on said Hartford Fire Insurance Company.

And the said plaintiff further saith, that at a term of said Kansas City Court of Common Pleas, held at the court-house in said Kansas City, on the 11th day of December, A. D. 1862, before the Honorable Jacob Boseman, sole and presiding judge of said court,
56 the said Hartford Insurance Company, by its attorney, appeared in said court and asked of said court leave to answer said petition within sixty days, and that afterwards, to wit, on the

4th day of February, A. D. 1863, said Hartford Fire Insurance Company, by its attorney, filed its answer to the merrits of said petition.

And plaintiff further says, that the cause of action set forth and stated in said petition and plea pending in said Kansas City Court of Common Pleas, and to which said Hartford Fire Insurance Company replied by its said answer, was and is the same identical cause of action, promises and undertaking, in the first count of the declaration in this action above mentioned, and none other.

And plaintiff further saith, said petition and plea was continued, depending, and undetermined in said Kansas City Court of Common Pleas, until the said plaintiff, afterwards and before said petition and plea was determined, and within one year next before the commencement of the plea in the above first count of this declaration mentioned, "In the Court of Common Pleas, in the county of Saint Louis, in the State of Missouri, from whence it was, and has been removed to the Circuit Court of the United States for the eastern district of Missouri," to wit on the 8th day of June, 1864, said plaintiff dismissed his said petition and plea so commenced by him in said Kansas City Court of Common Pleas, against said Hart-
57 ford Fire Insurance Company, to wit, at said Kansas City, to wit, at the eastern district of the State of Missouri.

And this he, the said plaintiff, is ready to verify, wherefore he prays judgment, and his damages by him sustained, on occasion of the non-performance of the said promises and undertakings in the said declaration mentioned, to be adjudged to him, &c.

(Signed) HICKS & DONIPHAN.
Att'y for Plaintiff.

And at said regular stated term of this Circuit Court, begun and held as aforesaid, the following further proceedings took place in this case on Tuesday, the second day of October, in said last-mentioned year, to wit:

Removed from the St. Louis Court of Common Pleas.

Demurrer filed.

JESSE RIDDLESBARGER, plaintiff,
agst.
THE HARTFORD FIRE INSURANCE CO., defendant.

This day comes the defendant, by attorney, and files its demurrer to the replication heretofore filed by the plaintiff in this case.

Which demurrer filed herein is in the words and figures following, to wit:

In the Circuit Court of the United States for the District of Missouri, ss:

Demurrer.

JESSE RIDDLESBARGER
vs.
THE HARTFORD INSURANCE COMPANY.

And now comes the said defendant, and says that the
58 replication by the said plaintiff filed in this cause, and the matters and things therein contained in manner and form, as the same are above set forth, are not sufficient in law to have and maintain his aforesaid action thereof against the said defendant, nor is any sufficient reply to the plea of said defendant, and said defendant is not bound to answer the same, and this it is ready to verify. Wherefore, by reason of the insufficiency of said replication of said plaintiff in this behalf, the said defendant prays judgment, and that said plaintiff may be barred from having or maintaining his aforesaid action thereof against said defendant.

(Signed) GLOVER & SHEPLEY,
For Def't.

And at said regular stated term of this Circuit Court, begun and holden as aforesaid, the following further proceedings took place in this case on Wednesday, the third day of October, in said last-mentioned year, to wit:

Removed from the St. Louis Court of Common Pleas.

Argued and submitted.

JESSE RIDDLESBARGER, plaintiff,
agst.
THE HARTFORD FIRE INSURANCE CO., defendant.

This day come the parties, by attorneys, and the demurrer of the defendant to the replication of plaintiff, heretofore filed herein, having been taken up, the said demurrer was argued by counsel and submitted to the court; and the court not being fully advised
59 in the premises took time to consider of its judgment thereon.

And at said regular stated meeting of this Circuit Court, begun and holden as aforesaid, the following further proceedings took place in this case on Thursday, the fourth day of October, in said last-mentioned year, to wit:

Removed from the St. Louis Court of Common Pleas.

Demurrer sustained.

JESSE RIDDLESBARGER, plaintiff,
agst.
THE HARTFORD FIRE INSURANCE CO., defendant.

This day come again the parties, by attorney, and the court having examined the questions of law arising upon the demurrer filed by the defendant to the replication of plaintiff herein, and being fully advised of and concerning the same, is of opinion that the law on said demurrer is for the defendant, and, in accordance with such opinion, now orders that the said demurrer be and the same is hereby sustained.

And at said regular stated term of this Circuit Court, begun and holden as aforesaid, the following further proceedings took place in this case on Friday, the fifth day of October, in said last-mentioned year, to wit .

Removed from the St. Louis Court of Common Pleas.

Final judgment.

JESSE RIDDLESBARGER, plaintiff,
agst.
THE HARTFORD FIRE INSURANCE CO., defendant.

60 This day comes the defendant, by attorney, and the said plaintiff failing further to answer or reply to the pleas filed by the defendant herein, the said defendant asks that the final judgment of this court be now entered upon the demurrer heretofore sustained herein, which is granted.

It is, therefore, now considered by the court that the plaintiff, Jesse Riddlesbarger, take nothing by his writ in this case, and that the defendants, the Hartford Fire Insurance Company, go hence, without day, and recover against said plaintiff the costs herein expended, and that execution or a fee bill be issued for such costs.

And, on the thirty-first day of October, in the year eighteen hundred and sixty-six, there was filed in the clerk's office of the U. S. Circuit Court, a bond, which bond is in the words and figures following, to wit :

Bond.

Know all men by these presents, that we, Jesse Riddlesbarger, as principal, and Washington H. Chick, as surety, are held and firmly bound unto the Hartford Fire Insurance Company, of Hartford,

Connecticut, in the full and just sum of five hundred dollars, to be paid to the said Hartford Fire Insurance Company, or its successors or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals, and dated this fourth day of October,
61 in the year of our Lord one thousand eight hundred and sixty-seven.

Whereas, lately at the October term, 1866, of the Circuit Court of the United States for the districts of Missouri, in a suit depending in said court between Jesse Riddlesbarger, plaintiff, and the s'd Hartford Fire Insurance Company, judgment was rendered against the said Jesse Riddlesbarger, and the said Jesse Riddlesbarger having obtained a writ of error of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Hartford Fire Insurance Company, citing and admonishing it to be and appear at a Supreme Court of the United States, to be holden at Washington, the first Monday of December next:

Now the condition of the above obligation is such that if the said Jesse Riddlesbarger shall prosecute said writ to effect, and answer all damages and costs if he fail to make good his plea, then the above obligation to be void, else to remain in full force and virtue.

(Signed) J. RIDDLESBARGER. [SEAL.]
" W. H. CHICK. [SEAL.]

Sealed and delivered in presence of
BEN. F. HICKMAN.

Approved by Samuel Treat, Judge of the U. S. Dist. Court for east. dist. of Missouri.

Endorsed on the same is the following, to wit:

UNITED STATES OF AMERICA, *Districts of Missouri, ss:*

Washington H. Chick, surety in the foregoing bond, being
62 duly sworn, deposes and says, that he is worth over and above his debts and liabilities the sum of one thousand dollars.

(Signed) W. H. CHICK,

Sworn to and subscribed by said affiant before me, at office, in the city of St. Louis, in said districts, this fourth day of October, A. D. 1867.

(Signed) BEN. F. HICKMAN,
Commiss'r of U. S. Circuit Court for the Districts of Missouri.

62 UNITED STATES OF AMERICA,
Circuit Court for the Districts of Missouri, ss:

I, Benjamin F. Hickman, Clerk of the Circuit Court of the United States in and for the districts of Missouri, do hereby certify the fore-

going sixty-two pages to contain a correct and complete transcript of the record and proceedings had in said court in case of Jesse Riddlebarger, plaintiff, against The Hartford Fire Insurance Company, defendant, as fully as the same remain on file and of record in said case, in my office.

In witness whereof, I hereunto subscribe my name, and affix the seal of said court, at office in the city of St. Louis, in said districts, this fourth day of October, in the year of our Lord eighteen hundred and sixty-seven.

[SEAL.] BEN. F. HICKMAN,
Clerk of said Court.

REC. 274—3

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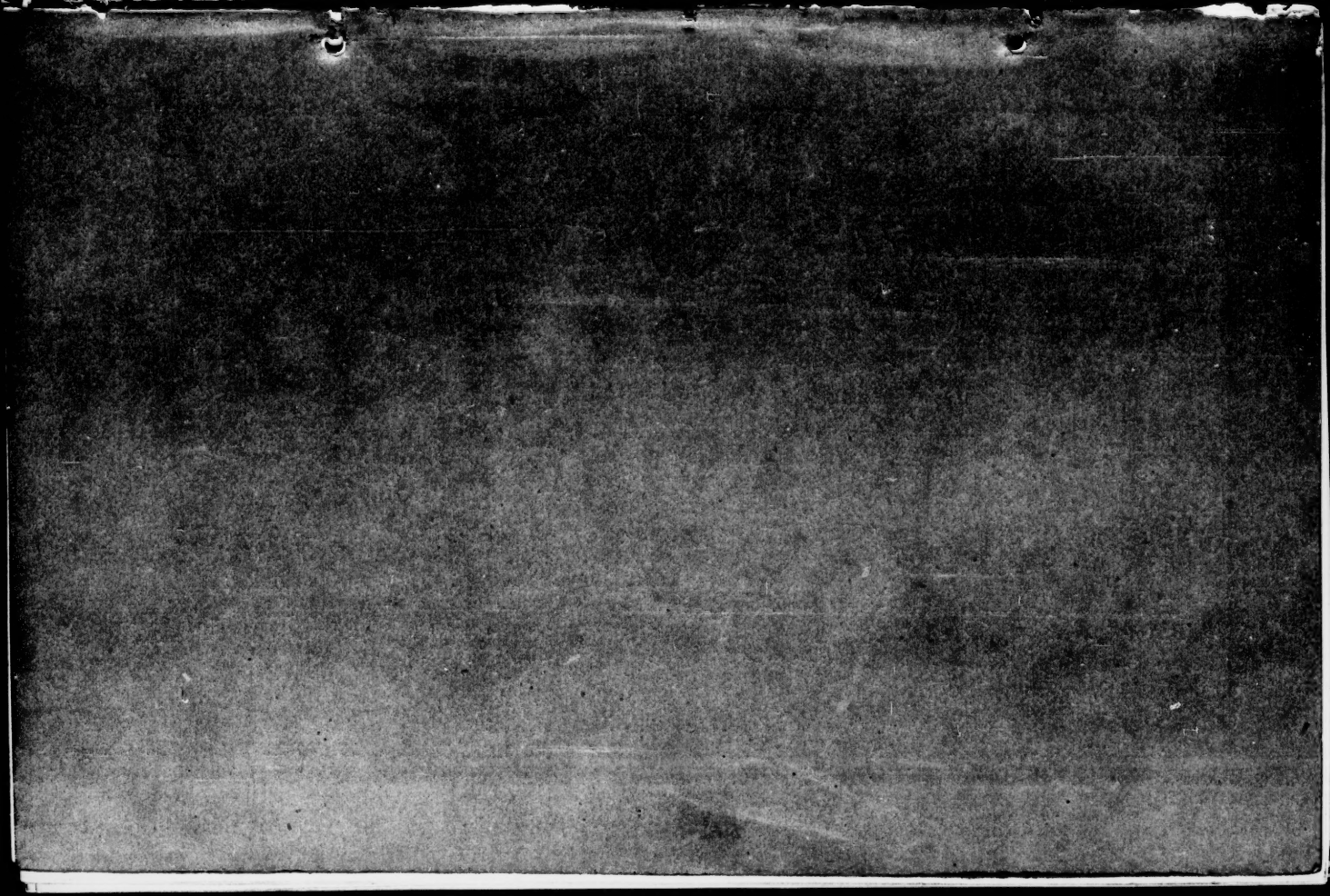

Supreme Court of the United States.

DECEMBER TERM, 1868.

JESSE RIDDLESBARGER, PLAINTIFF IN ERROR,

vs.

THE HARTFORD FIRE INSURANCE COMPANY.

No. 126.

BRIEF FOR PLAINTIFF IN ERROR.

JAMES HUGHES,

OF COUNSEL FOR PLAINTIFF IN ERROR.

WASHINGTON, D. C.

PRINTED BY WM. H. MOORE, 484 ELEVENTH STREET.

1869.

In the Supreme Court of the United States.

DECEMBER TERM, 1868.

JESSE RIDDLESBARGER, *Plaintiff in Error*,
vs.
THE HARTFORD FIRE INSURANCE COMPANY. } No. 126.

Brief for Plaintiff in Error.

Error to the Circuit Court of the United States for the districts of Missouri.

Judgment was given in the court below for the defendant, upon demurrer to the replication.

The material parts of the record are: *The Amended Declaration*, (Rec., pp. 14 to 25;) *The Pleas*, (p. 27;) *The Replication*, (pp. 28–9;) *Demurrer thereto*, (p. 30;) *Judgment thereon for defendant*, (p. 31; *Demurrer to Declaration*, (p. 25;) *Judgment thereon*, (p. 26;) and *Interlocutory orders to amend* and *to plead*, (p. 26.)

The suit in the court below was an action on a policy of insurance for five thousand dollars.

The property of the plaintiff was destroyed by fire without fraud or fault on his part, and he was defeated in his attempt to collect the assurance money, by technical defences. The questions arising on the record are purely technical. Whatever of merit there was in the case was clearly with the plaintiff. These questions are fully discussed, and authorities cited hereafter.

The plaintiff maintains the following propositions:

1st. The Court erred in sustaining the demurrer to the second and third counts of the declaration, and overruling it as to the first. (Rec., p. 26.) This, whether the 2d and 3d counts were good or

not, as the demurrer was a general one *to the whole declaration*, and not to each count separately.

Finding one count good on such a state of pleadings, the Court should have overruled the demurrer as to the whole declaration. This is the first error in the record, and the cause should be reversed and remanded for proper proceedings from this point.—*1st Chitty's Pleadings, marginal, page 703; Dewitt vs. Post, 11th Johnson's Reps., p. 460; Arnold and others vs. Sandford, 15th Johnson, p. 534.*

The leave to amend the second and third counts granted at page 26 of the record, but of which the plaintiff never availed himself, was no waiver of the above error. Neither was there a discontinuance, as the pleas are in form, to the whole declaration.

2d. The special plea of the defendant (Record, p. 27) is bad.

3d. The replication thereto (Record, pp. 28–9) is sufficient.

Argument on the Second and Third Propositions.

This was an action on a Policy of Insurance issued by Defendant in error to Plaintiff in error, on the first day of June, 1861, on a brick warehouse of plaintiff, situated in Kansas City, State of Missouri. The amount of the insurance was $5,000, and on March 23d, 1862, the warehouse was destroyed by fire.

Among the conditions annexed to the policy of insurance, and by the terms thereof made part of the same, is the following clause: "It is furthermore hereby expressly provided that no suit or action of any kind against said Company for the recovery of any claim upon, under, or by virtue of this policy, shall be sustainable in any court of law or chancery, unless such suit or action shall be commenced within the term of twelve months next after the loss or damage shall occur; and in case any suit or action shall be commenced against said company after the expiration of twelve months next after such loss or damage shall have occurred, the lapse of time shall be taken and deemed as conclusive evidence against the validity of the claim thereby so attempted to be enforced."

On the 25th day of July, 1864, plaintiff in error commenced a suit on said policy of insurance vs. defendant in error, in the Common Pleas Court of St. Louis county, State of Missouri, to recover the sum insured, and on motion of defendant in error, said suit was

transferred from the Court of Common Pleas of St. Louis county to the Circuit Court of the United States for the District of Missouri. When the cause reached the latter court, plaintiff in error moved to dismiss, which motion was overruled. Defendant in error then filed a general demurrer to the petition, not because it did not state facts sufficient to constitute a cause of action under the practice act of the State of Missouri then in force, but for the reason that it did not conform to the practice of the Circuit Court of the United States. The demurrer was sustained, and plaintiff in error then filed an amended Common Law declaration consisting of three counts, to which a general demurrer was also filed, and sustained as to the second and third counts, but overruled as to the first. To the first count defendant in error filed two pleas; *First*, Non Assumpsit; *Second*, A special plea in the nature of a plea of the Statute of Limitation, the substance of which special plea was, that the action on the policy had not been commenced within twelve months next after the loss had occurred. To this plea plaintiff in error replied that an action was commenced in the Kansas City Court of Common Pleas, in the county of Jackson, State of Missouri, on the 10th day of June, 1862, to recover the amount insured; that defendant in error appeared to the action, and filed an answer to the merits of the petition; that said suit was pending and undetermined in said court until the 8th day of June, 1864, when the same was dismissed by the plaintiff in error; that the present suit was brought in the Court of Common Pleas of St. Louis county, Missouri, on the 28th day of July, 1864, and within twelve months after the case had been dismissed in the Common Pleas Court of Kansas City.

To this replication defendant in error demurred generally, and plaintiff in error having joined, the demurrer was sustained and general judgment rendered thereon vs. plaintiff in error. To reverse that judgment, the cause is brought into this Court by Writ of Error.

Plaintiff in error makes the following points:

1st. Parties cannot by a contract agree upon a limitation different from the statutes within which suit shall be brought, or the right to sue be barred.

This would be in conflict with the law and its policy.—*5th McLean's R.*, 461; *French et al. vs. Lafayette Insurance Co.*; *9th Indiana*, 443; *2d Indiana*, 102.

This is an attempt to bar or discharge a right of action before

the right accrues. It is a well settled principle, that a release can only operate upon an existing claim.—*Coke*, 265; 4 *Mass. R.*, 688; 7 *Mass. R.*, 155; 15 *Mass. R.*, 110; 4 *Pickering R.*, 368.

Why has a condition or agreement in a policy, providing that all disputes arising under it shall be referred to arbitration, been held to be void? Because it is an attempt to oust the jurisdiction of the courts.—2 *Arnold*, 1245; 1 *Phillips on Insurance*, 23; 5*th Ohio State Reports*, 124; 1*st Wilson*, 129; 4 *Watts*, 41; 6*th Har. & Johnson R.*, 413.

2d point. But if the limitation contract, as to the time of bringing the suit, is valid and binds the plaintiff to commence his action within twelve months next after the loss occurred, then it is insisted that inasmuch as plaintiff did commence his action against the defendant, within the time prescribed, viz.: on the 10th day of June, 1862, in the Kansas City Court of Common Pleas, in Jackson county, Missouri, in which he sought to recover, for the same cause of action and none other, that he seeks to recover for in the present suit; to which action defendant appeared and filed an answer to the merits thereof; that said action was pending and undetermined in said court until the 8th day of June, 1864, when plaintiff suffered a nonsuit therein, and the present action was commenced in the Saint Louis Court of Common Pleas, on the 18th day of July, 1864, and within twelve months after the nonsuit was suffered; then plaintiff has complied with the condition in said contract according to, and in compliance with the then existing laws of Missouri, and is entitled to maintain the present action.—4*th Ohio State Reports*, 272, *Haymaker vs. Haymaker.*

First point: The contract was made at Kansas City, in the State of Missouri, and was made with reference to the then existing laws of that State.

That law became a part of the contract itself, and to that law we must look in giving a construction to the contract; and so far as the remedy is concerned, when suit is brought in that State to enforce a right growing out of that contract, the law of that State must alone govern and determine. The revised statutes of 1855 were in force when the contract was made, and so continued in force until after the commencement of this suit in the Common Pleas Court of Saint Louis county.

By the statute of limitations (page 1,048) it was provided that

actions of this kind should be brought within five years next after the cause of action accrued, and by the 3d section of the 3d article it is provided that if any action shall have been commenced within the times respectively prescribed in the preceding articles; and the plaintiff therein suffer a nonsuit, &c., such plaintiff may commence a new action, from time to time, within one year from the time of such nonsuit suffered.

It is believed the point now under consideration has never been adjudicated and settled in this Court.

In 1848 the precise question came up for adjudication in the Circuit Court of the United States, in the case of Gray vs. the Hartford Insurance Company, before Mr. Justice Nelson, reported in 1st Blatchford, Circuit Court R., 280; and he decided that where a policy of insurance, provided no action should be sustained against the insurer, founded thereon, unless brought within twelve months after the cause of action accrued, and that the lapse of time in case of such suit should be deemed conclusive evidence against the claim set up; and he held that such a provision was valid and binding between the parties, and was a good defense to a suit brought on the policy more than twelve months after the cause of action accrued.

In 1853 the same question came up again in the Circuit Court of the United States, before Mr. Justice McLean, (see 5th McLean's R., 462,) and he decided and held, "That parties cannot by a contract agree upon a limitation different from that in the statute "within which suit shall be brought, or the right to sue be barred;" and that such a provision was no bar to an action brought after the expiration of twelve months from the time the cause of action accrued.

There seems to be a conflict of opinion between these two eminent Judges, and the question is still an open one in this Court.

There is also a conflict of opinion in the State Courts, but the weight of authority would seem to be in favor of the validity of such contracts.

But it is also understood that this Court does not feel itself bound by the decisions of State Courts in cases like the one at bar.

A short review of those decisions, and the reasons for them will show that the validity of such a contract as we are now considering is still an open question in the State Courts.

That aithough there are several cases that recognize the validity of the contract, yet they are not of such a character as to put the question at rest. In Vermont the decisions have been in favor of the validity of the contract.

The case of Wilson vs. the Ætna Insurance Company, is perhaps the strongest case that can be found in its favor; and even in that case the reasoning seems harsh and unsatisfactory.

The court says: It is clear that the parties might have agreed that no action should be brought until after any given time, say one, five, or fifty years, and they would be bound by the limitation. It is but a limitation as to the time within which an action may be brought; and whether you exclude the first year, and include all time after, or include the first year and exclude all time after, it seems impossible to find any difference in the principle of the contract or its legal policy.

Now, the reasoning of this case seems diametrically opposite to that of Mr. Justice Nelson, in the case in 1 Blatchford, 280, where he says: "There might be some force in the argument that an agreement to extend the time beyond the statutory limits was against law, and void;" but there is none, as respects a limitation, short of it.

Again he says, the clause contemplates a loss, about which a controversy may arise, between the insured and the company, and in respect to which indemnity may be desired. The object was not to foreclose it and prevent a resort to the proper tribunal, but to compel a speedy resort and a termination of the controversy while the facts were fresh in the recollection of the parties and witnesses, and the proofs accessible.

Thus we see these two eminent judges disagree, both in the law and reason of that thing.

The one holding that a limitation of time in a contract within which a suit may be brought, if it shortens the limitation fixed by statute, is valid; but if the time was extended beyond the time fixed by statute, it would be void, and asserts that one great reason why a shorter time is valid is that a speedy adjustment may be had while the facts are fresh in the minds of all, and the proofs accessible.

The other says, that a limitation in a contract prolonging the time within which an action may be brought, beyond what is fixed

by statute, even to fifty years, would be valid; and consequently that the reasoning of Mr. Justice Nelson, in support of the validity of a shorter limitation than that fixed by statute, viz: to compel a speedy resort and a termination of the controversy, while the facts are fresh in the recollection of the parties and witnesses and the proofs accessible, affords no grounds, no support to the validity of a shorter limitation than is fixed by statute.

The case of Dutton vs. Vermont Mutual Insurance Company, 17th Vermont R., 369, and Williams vs. same Company, are not in point. The defendant was a mutual insurance company, and all the individuals who insured therein became members during the terms of their respective policies, but no longer; and by the act of incorporation it was enacted, among other things, that suit should be brought within a certain specified time after such loss happened, &c. When the plaintiffs in those cases insured they became members of the incorporation, and were bound by the statutes creating the incorporation. The harsh features in the case in the 29th Vermont is where the court say "That a party "driven to a nonsuit before the cause of action would have been "barred by statute, and after the special time limited by contract, "could bring no other suit, unless such an exception had been con-"tained in the clause of limitation."

Now, in this very case an action had been brought within the time specified in the contract in the proper court, and in good faith. It failed, and through no act or fault of his, and from a cause entirely disconnected from its merits, but during its pendency six months had expired.

The cause of the failure was a defect in the proof of the destruction of the policy, which was destroyed at the same time with the property insured.

Now, in some of the cases hereafter cited, six months was the time of limitation. In the State of Missouri, outside the city of St. Louis, at the time the loss complained of happened, there was no Court where a suit could have been brought and determined in a year. Such limitations being in derogation of common right, will be sustained with hesitation; and this Court will seriously pause before it sanctions a contract of limitation in a contract of insurance, that will, in many cases, prevent the injured and inno-

cent party from seeking any redress, in the most meritorious cases, in the Courts of the country.

Such limitations of time have been held valid in Connecticut, though in the case of Woodbury Savings Bank vs. Charter Oak Insurance Company, 31st Con. R., 525, the Court say they have maintained the integrity of such contract almost to the denial of justice; and surely this Court will not uphold a contract in a policy of insurance that will work injustice to one of the parties, when by deciding otherwise it will not impair the rights of any one, but refer the parties to the general remedies afforded by the laws of the State, for the time, manner, and place of making application to the Courts for redress of wrongs.

The same doctrine as to limitation of time in a contract of insurance within which a suit may be brought is adopted in 4th Mass.—See 7th Gray, 61.

But, even in that case, the Court tacitly admits there is something harsh and a little unreasonable in the doctrine of such limitations, for they say: "There is no such *unreasonableness* in the 'provisions of this policy as to authorize,and require the Court to 'interfere," &c.

In the State of Rhode Island, (see 5th Rhode Island R., 400,) Brown vs. Roger Williams Insurance Company, the Court says a contract of limitations as to the time of bringing suit on a policy of insurance is valid, but the Court said it was a question of some difficulty, and upon which there was a conflict of authority.

In Pennsylvania the decisions of the Courts have been in favor of the validity of such contracts of limitation, and in the case in the 31st Pennsylvania R. the Court says that a contract that no suit should be sustained unless commenced within six months after the cause of action accrued was valid.

The Court below held differently, and thought the contract invalid; and we may remark that, even in those States, where such contracts are upheld by the highest courts, the doctrine is very far from obtaining universal assent.

The case in the 6th Ohio State R., 599, is like the cases in 17th and 20th Vermont, already cited.

The defendant was a matual fire insurance company, and the plaintiff a member, and the limitation as to the time of bringing suits was a part of the charter itself, and the Court say (page 603)

the limitation is contained in the very act of incorporation itself; it is in effect a part of the contract between the whole company in the aggregate and every individual member; the case therefore is not in point.

The doctrine is recognized in New York, though it would seem the courts have not sustained it with a very good grace, for in Ripley vs. the Ætna Insurance Company, 29 Barbour, 552, the Court says: "This Court, at general term, have decided that a "stipulation, requiring the insured to sue, if at all, in twelve "months, although binding originally, may be waived by the lan- "guage or conduct of the parties, and the jury, on the second "trial, having found that, in the present instance, there was such "a waiver, we are now to inquire whether that finding and the "rulings that led to it were warranted by the law and the testi- "mony."

"A twelve months' statute of limitation, although assented to by "the parties, operates as a forfeiture. It is therefore to be con- "strued strictly. Slight evidence of waiver, as in other cases of "forfeiture, will be sufficient to defeat its application. A positive "act of defendant's intending to induce postponement is not ne- "cessary. Silence on the subject in the midst of negotiations for "settlement during the year, however intended, was held by the "general term to be competent evidence to go to a jury; and if "competent, its weight was to be determined by them."

The Court, especially to aid a forfeiture, and a harsh one, too, will not scrutinize very closely their verdicts on such a point, nor, we may add, the rulings at the trial unless clearly erroneous.

It would seem, in this case, the Court felt bound to give validity to the contract of limitation; but that they did it with extreme reluctance, and almost with loathing and disgust, as not entitled to any favor; a contract that operated as the forfeiture of a right.

Forfeiture of what right? Could it be the forfeiture of any other right than that secured by law to every citizen, to bring his or their action, for the redress of grievances, within the time limited by the law of the State? It certainly could be none other. If it was a contract, legal, moral, equitable, and just, not against the policy of the law, a contract that worked a forfeiture of no right, why not give the defendant, the insurance company, the full benefit of it?

If the contract was a valid one, not against the policy of the law, why not give the insurance company the benefit of it, the same as any other contract?

Why say that "the Court, especially to aid a forfeiture, and a "harsh one, too, will not scrutinize very closely their verdict on such "a point." And says the judge who delivered the opinion in that case: "I may add the rulings of the judge at the trial very closely, "unless clearly erroneous."

This case shows, very clearly, that the Court who pronounced it, thought such contracts against the policy of the law, and in derogation of the rights of the insured.

We have thus noticed the principal cases in support of the validity of such limitation contracts, and we have seen that some of them give unqualified support to them, while others speak with doubt and hesitation, and with reluctance acquiesce in it.

On the other hand, there are some cases as we have seen that are directly opposed to it, as the case in 5th McLean's R., 462, and some others, as 9 Indiana, 443; 2 Indiana, 102.

2d point. But if the limitation contract in the policy as to the time of bringing the suit is valid, and binds the plaintiff to commence his action within twelve months after the loss accrued, then it is insisted that inasmuch as plaintiff did commence his action against defendant within the prescribed time, to wit: on the 10th day of June, 1862, in the Kansas City Court of Common Pleas, in which he sought to recover for the same cause of action, and none other that he seeks to recover for in this suit; to which suit defendant appeared and filed an answer to the merits; that said suit was pending and undecided in said Court, until the 8th day of June, 1864, when plaintiff suffered a nonsuit therein, and the present cause of action commenced in the St. Louis Court of Common Pleas on the 28th July, 1864, and within one year after such nonsuit suffered; plaintiff has complied with the condition of said contract as to time, and is entitled under said contract and the then existing laws of the State of Missouri, to maintain this action.

The limitation contract in the policy requires that all suits for losses sustained shall be commenced within twelve months after the loss accrued, or be forever barred.

The defendant's special plea in bar alleged that the suit was not

commenced within twelve months next after the loss happened, and therefore could not be maintained.

The replication alleges that the loss happened on the 23d day of March, 1862, that suit was instituted in the Common Please Court of Kansas city, on the 10th day of June, 1862, and was undetermined until the 8th day of June, 1864, when the nonsuit was suffered, and the present suit commenced on the 28th day of June, 1864, and within twelve months after nonsuit suffered.

It has been already stated that the contract was made in Kansas city, in the State of Missouri, and was made with reference to the law of that State, and that law entered into and made a part of the contract, and that law will alone govern and determine the rights of the parties under it.

If, in making this contract of insurance, the parties have made a stipulation, not illegal in itself, or against the policy of the law, that circumscribed within narrower limits any of the rights or remedies afforded by the general law of the State for the enforcement of such contract, innovating on the rights or remedies, of the general laws of the State governing such contract, that part of such contract will be strictly construed; and if its innovating terms have been complied with, as in this case, by commencing the action within the prescribed time, the plaintiff will be left to pursue his remedy in all other respects as if no such limited time for bringing the action had been inserted in the contract.

I think, upon examination, that none of the cases that uphold the validity of such limitation contracts, &c., in policies (except one shortly to be noticed) show whether in the statutes of limitations of the several States where such cases have been decided there are similar provisions and provisoes, as in those of Missouri. I have looked into the acts of limitations in several States, to wit: Iowa, Vermont, Massachusetts, Connecticut, Rhode Island, New York, Georgia, Indiana, and Ohio, and in none of them, except in those of Ohio, do I find provisoes and exceptions like those in the Missouri statutes.

Those of Ohio are like those in Missouri, and the decisions have been in conformity with what we contend for here.

The revised statutes of Missouri of 1855 provide that actions of this kind shall be brought within five years after the cause of action shall have accrued, but the third section of the third article

of the same law provides: If any action shall have been commenced within the times respectively prescribed in the preceding articles, and the plaintiff suffer a nonsuit, or after verdict for him, &c., such plaintiff may commence a new action, from time to time, within one year after nonsuit suffered, &c.

The policy circumscribed or limited the time of bringing actions to one year after loss happened.

The suit was brought in the Kansas City Court of Common Pleas within the circumscribed and limited time; plaintiff suffered nonsuit, and within one year from the time of nonsuit suffered, commenced this suit; and the question is, shall he have the benefit of the proviso in the 3d section of the 3d article, or is the contract in the policy that the suit shall be brought within the year, so potent, so powerful in its effect and operation as not only to bar the plaintiff from bringing another suit, no matter for what cause he may have been compelled to take a nonsuit, but that it also overrides and renders of no effect the 3d section of the 3d article that gives the right, in any case, within twelve months after nonsuit suffered?

In Haymaker vs. Haymaker, 4th Ohio State Reports, 274, the case was, Andrew Haymaker, the plaintiff below, in an action of assumpsit brought against the defendant below, filed a declaration containing three counts. The first alleged in substance that, in 1823, he entered into a contract with the testator, by which he agreed to serve the testator for three years, in consideration of which services the testator agreed to convey to the plaintiff fifty acres of land in Portage county; that the plaintiff performed the labor; that the testator refused to make the deed, and afterwards conveyed the land to a stranger.

Afterwards, and after the statute of limitations had barred the plaintiff's claim, and within six years before the commencement of the suit, the testator promised to pay the plaintiff for his services. The second count alleges that, in consideration of the work and labor of plaintiff before that time done and performed for the testator, of the value of $800, testator promised to pay to plaintiff what the work and labor were reasonably worth, and he averred they were worth $800.

The third count contained all the common counts in one in the usual form.

The defendant pleaded firstly, non-assumpsit; secondly, the statute of limitations; and third, a special plea "that the plaintiff "had presented the claim upon which the action was brought to "the executors for their acceptance, according to the statute in "such case made and provided, and requested the executors to "approve the same; but that the executor rejected the same, and "that this suit was not brought until more than six months after "such rejection."

To this special plea the plaintiff replied that he had brought another action within six months after the rejection of his claim by the executor, and that he was nonsuited by the Court in said action, and that afterwards, and within six months from the time of said nonsuit, he had brought the present action.

To this replication the defendant rejoined that when the plaintiff brought the first action he was a non-resident of the county of Trumbull, and that he was ordered by the court to give security for costs within forty days, or become nonsuited, and that he failed to give such security, and in consequence thereof was nonsuited.

To this rejoinder the plaintiff demurred, and the District Court sustained the demurrer.

Thus far it is seen that the case in Ohio is precisely like the case now before this Court, and the statutes of limitation the same in Ohio as Missouri.

And the Court said whether the demurrer should have been sustained or not upon a construction of the statute of limitations of that State was the question. "That by the 98th section of the "administration act it is provided that no action shall be brought "against an executor or administrator until after eighteen months "from the date of the administration, or the further time allowed "by the court for the collection of the assets of the estate, except "in certain cases therein named, one of which cases is provided "for by the 90th section of the same act.

"This section provides that if a claim against the estate of any "deceased person be exhibited against the executor or administrator, and shall be rejected by him, if the debt be due, the claimant shall, within six months after such rejection, commence suit "for the recovery thereof, or be forever barred from commencing "an action thereon; and a claim shall be deemed disputed or rejected if the executor or administrator shall, on the presentation

of the vouchers thereof, refuse, on demand made for that purpose, " to endorse thereon his allowance of the same against the estate."

It will be perceived that by this section no provision is made to save the rights of claimants who shall have commenced their suits within the six months and shall become nonsuited. Nor is any such provision made for a case where the suit shall abate; or where the plaintiff obtains a verdict and the judgment be arrested; or where judgment shall be rendered in favor of the plaintiff, and the judgment shall be reversed for error.

In neither of these cases is any provision made in express terms authorizing another action to be commenced at any time after the expiration of the first six months.

The court then goes on to say: " There is, however, in our statutes " of limitation a condition which provides that if any action be com- " menced within the time limited by the act, judgment shall be re- " versed or arrested, or the suit abate, or the plaintiff becomes non- " suited, after the time limited as aforesaid shall have expired, the " plaintiff may commence a new action within one year after such " arrest or reversal of judgment, or non-suit, or abatement of action, " and not after."

And the court further says " that it will be seen by the reading " of these two acts, that neither of them provides in express terms " for the case in which an action has been brought against an execu- " tor or administrator who has rejected a claim, and suit is brought " within the six months prescribed by the statute; but after the ex- " piration of the six months, the judgment is reversed, or the plain- " tiff becomes nonsuited. It is very clear that the Legislature inten- " ded that the plaintiff should not lose his debt if he commenced his " action before the bar was complete, and afterwards, and after the " statute time had expired, he should be nonsuited, but have one " year thereafter in which to commence a new action."

Here, then, was a case unprovided for by statute, and the Court said the only question was, whether the equity of the provisions of the statutes of limitations could be extended beyond its express provisions so as to provide for a case under the administration law, where the claimant must commence his suit within six months, and actually does so, and afterwards becomes nonsuited or his judgment is reversed.

And the Court in that case decided that the equity of the provis-

ions of the statute should be so extended, and that the rejoinder was no legal answer to the replication, and that the Court below did not err in sustaining the demurrer. (See case 4th O. S. R.. 280 and 281.) And this the Court did for good reasons, upon sound construction, and strong analogy.

The fourth section of the statute of James provided that if, in any of said actions or suits (meaning the actions or suits mentioned in the English statute of limitations), judgment be given for the plaintiff, and the same be reversed for error, or a verdict pass for the plaintiff, and upon matter alleged in arrest of judgment, the judgment be given against the plaintiff; that he take nothing by his plaint, writ or bill, the plaintiff in such case may commence a new action within one year and not after. See Angell on Limitation, 402. The English statute of limitations extended by its terms to only two cases—arrest of judgment and reversal by write of error. The several statutes of Ohio as well as those of Missouri extend to nonsuits and abatement of actions.

Under the English statute, if any action had been commenced within the six years, and by the death of one of the parties the action abated, the statute has been so construed that a new action may be commenced, though the six years have expired.

In such case, however, the action must be commenced within a reasonable time, which has been held to be one year, the courts following the equity views of the Legislature in cases of arrest or error, and such may be considered the settled law of England and the United States. See Angell on Limitations, 404 and 405, and authorities there cited.

And it is to be observed that these decisions are based upon a construction of statutes wherein no saving is made for a nonsuit for the abatement of an action by death or otherwise.

It has, however, been held that when a plaintiff becomes nonsuited no new action could be brought, but this was always under statutes where there was no saving in case of nonsuits.

But the general statutes of Ohio and Missouri expressly save the rights of plaintiffs in case of nonsuits, and allow them one year thereafter in which to bring their actions.

Now, as there is a general statute law in Missouri saying that actions shall be brought within certain specified times, and not after; but there is also a general exception providing that if such

action shall be commenced within the prescribed time, and after such time has expired, the plaintiff suffer nonsuit, he may commence another action for the same causes within one year from the time of such nonsuit suffered.

Now, upon the principle of adjudged cases, if in the State of Missouri, a statute of limitations was enacted applicable to one particular subject, only, for instance, that all actions on policies of insurance should be brought within twelve months after the loss happened, and there had been no exception in the act providing that if the action should be brought within the time, and plaintiff suffered nonsuit, after the limitation expired, that he may bring another action after nonsuit suffered, plaintiff would have a reasonable time in which to commence a new action, and that reasonable time would be twelve months, the time allowed by the general statute, in which to bring a suit after nonsuit suffered.

Now it will scarcely be contended that if there were no proviso or exceptions to the general provisions of the statute of limitations, that after the five years had elapsed, and a nonsuit suffered by the plaintiff, he could again bring his suit.

Without such proviso or exception, the limitation in the statutes and in the contract in the policy would stand on the same footing, and no action could be brought in either case after nonsuit suffered.

But we have already seen that where there is a general proviso or exception in the general statute of limitations, and there is also a statute of limitation relating to a particular subject, and in the last statute there is no such proviso or exception. Yet that the equity of the provision of the general statute shall be extended so as to provide for the case under the particular statute where the plaintiff must commence within twelve months, and actually does so, and afterwards becomes nonsuited or his judgment is reversed.

When we look through the cases that have been decided under a special limitation contract in the policy we find one great reason urged in favor of the validity of such contracts, viz: that they contemplate a loss about which a controversy may arise between the insured and the company, and in which the right to indemnify may be denied. In other words, that the object was not to foreclose it, and prevent a resort to the proper tribunal, but to compel a speedy resort to the courts and a final determination of the controversy while the facts are fresh in the recollection of the wit-

nesses and the parties, and the proofs accessible. (*See* 1*st Blatchford C. C. R.*, 289.)

If the special limitation contract could have the potent effect here claimed, it certainly would be a strong argument for upholding the validity of the contract. But certainly there can be no good reason, after a party has commenced his suit in good faith, within the prescribed time, and has after the expiration of such time been compelled, without any fault of his, and with an anxious desire to have his suit tried on its merits, to take a nonsuit.

Why should he not be permitted to renew his suit within a reasonable time, to secure a just debt or claim?

This doctrine has been characterized by the courts of New York as harsh and forbidding, and operating as the forfeiture of a right.

Harsh and forbidding it undoubtedly is, for if contemplates that country attorneys, as well as the more learned and able lawyers of large towns and cities will at all times possess sufficient skill and ability, and will, under all circumstances, conduct their causes to a successful termination without nonsuit, reversal or arrest.

Nor can it have the potent effect ascribed to it in terminating quickly the controversy between the parties. It may compel a speedy institution of the suit, but there its efficacy for good ceases.

The honest assured plaintiff, who believes he has a just cause of recovery upon an insurance policy against an insurance company, and who desires to realize the loss he has sustained, needs not the promptings of a special limitation contract to urge him to a speedy institution of a suit, or to attain a speedy termination of such suits in order to realize his money. It is against human nature to say so.

True, the dishonest man, one who wants the witnesses out of the way and facts forgotten; in short, he who wants to swindle the insurance companies, may, by the special contract of limitation, be compelled to institute his suit sooner than he otherwise would; but it can no more compel him to a speedy termination of the controversy, than water seeks it level by running up hill.

The law's delays are familiar with such men, and they will use them.

Besides, to suppose that those men who obtain insurance policies are generally of a character to seek delays in their suits against

insurers in order to wrong them, or to cheat and swindle, is looking rather on the dark side of human nature, and is rather against that maxim of the law which esteems all men honest until the contrary appears.

Now, if the courts give the provisions of the statutes of limitations an equitable construction, so as to obtain the ends of justice, why should not the same equitable construction be applied to limitation contracts made between the parties as to time, especially when those very statutes and their equitable construction were in the eyes of the parties when they made that contract.

But is their any good reason why the contract in the policy should control the statutes any further than that a suit must be brought within the twelve months from the time the loss happened?

The terms of the contract in this case have been complied with, and the suit was brought for the same cause of action.

When that contract was made, there stood the law of the State of Missouri, which said a suit of this kind must be brought within five years from the time the loss accrued, or be barred. And there, also, stood the proviso and exception, which said if brought within that time, and a nonsuit was suffered, that a new suit could be brought within twelve months after nonsuit suffered.

Wherein did their limitation contract differ from the law of the statute of limitations?

In nothing but this, viz: that suit should be brought within twelve months after the loss happened, instead of five years.

Did this contract, then, have any effect on any other clause of the statutes of limitations of the State of Missouri than the 3d section of the 2d article of said statute, and the 3d section of the 3d article of the same statutes?

The 3d section of the 2d article provides that actions of the character of the one now under consideration, shall be commenced within five years after the cause of action shall have accrued. The contract in this policy says the action shall be brought within one year—a difference as to time only.

The 3d section of the 3d article provides, "that if any action "shall have been commenced within the times respectively limi- "ted in the preceding articles, and the plaintiff therein suffer a "nonsuit, &c., such plaintiff may commence a new action from "time to time within one year after such nonsuit suffered," &c.

There certainly is no provision to that effect in the policy now under consideration.

But when the parties made this contract, the 3d section of the 2d article of the statute of limitations of the State of Missouri was before them.

They saw that an action could be commenced at any time within five years.

By the contract they reduced that time to twelve months.

They also saw the 3d section of the 3d article, which provides that if any action shall have been commenced within the times respectively prescribed by the foregoing articles, and the plaintiff therein suffer a nonsuit, or after a verdict for him the judgment be arrested, or after judgment for him the same be reversed on error or appeal, such plaintiff may commence a new action from time to time within one year after such nonsuit suffered, or such judgment arrested, &c. They restricted the time for the bringing of the suit in the 3d section of the 2d article; but they say nothing about the 3d section of the 3d article. The defendant in error comes and asks the court to say that they have made an alteration in the 3d section of the 3d article, and that they are not bound by its provisions.

But there is one rule of construction that forbids this.

It is a maxim of law, say the court in 10th Peter's Reports, 517, "That an exception, carved out of a general clause, leaves all other "cases within the scope of the clause." And again they say "that "the express exceptions in policies against fire leaves within the "scope of the general terms of such policies all other losses by fire."

Here, then, is a general law of limitation for the State. It contains many provisions in three separate and distinct articles.

The parties agree to circumscribe within narrower limits the time mentioned in a particular section, and leave all the rest of its provisions in full force and vigor.

They have made their exception, and if there be any truth or virtue in the maxim which is as old as the law itself, the company is bound by it, and the statute must govern in all beside.

And this is the fair inference from one of the strongest cases on the other side. I allude to the case of Wilson vs. the Ætna Insurance Company, 27th Vermont R., 99.

The court says in that case: "Contracts of insurance are construed

with great strictness by courts, and justly so. It is well settled that the insurer is bound to the truth of all representations, and the slightest breach of good faith or warranty in regard to the risk avoids the policy. So in the case of loss the assured cannot recover if he fail strictly to comply with all the terms of the policy in regard to the time and mode of reporting his loss, or procuring certificates of its being in good faith, or even its amount, when such conditions are made explicit prerequisites to the right of recovery. We see no possible reason why this condition should not be equally binding."

No court of law could relieve the party from the performance of a condition of this nature, unless upon proof of the fraud of the other party, statutes of limitations would be subject to no such exception, unless by express terms of the statutes.

The doctrine laid down in the 27th Vermont must be confined strictly to the law and the facts of the case.

Now, it will be recollected that in Vermont the statute of limitations had no such proviso or exception as is found in Missouri and Ohio, viz: If any action shall have been commenced within the times respectively prescribed by the statute, and plaintiff shall suffer a nonsuit, &c., he may commence a new action within one year after nonsuit suffered, &c.

And the court in the Vermont case says, that a party being driven to a nonsuit in his former suit is no excuse for not bringing a suit before the cause of action was barred by the statute or by the terms of the contract, "unless"—mark the words—unless such an exception is contained in *such act* or contract, no court has any authority to incorporate it.

Now here in the statutes of Missouri such exception is contained in the act of limitation, and it is contended that the contract in this policy was made with reference to that exception and that the plaintiff is entitled to the benefit of it.

In the case of Haymaker vs. Haymaker, in 4th Ohio State R., 272, before cited, we have seen that the court did incorporate such an exception in favor of the plaintiff, and that too in accordance with adjudged cases.

And in the case in the 27th Vermont, 99, the court cannot mean anything else than if there had been in the statutes of limitations of Vermont a provision similar to that in Missouri, in relation to bringing suits within a year after nonsuit suffered, they would have

extended the benefit thereof to the plaintiff in the case then before them.

If incorporated into the contract it would affect that case only, but if incorporated into the general statutes of limitations by way of exception, the equity construction of its provisions would reach all such special contract limitations as that then before the court, and such as the one *now* before this Court, where the agreement was nothing more than that suit should be brought within one year after the loss accrued, instead of five; and such suit was commenced within the year.

So in the case of Woodbury Savings Bank vs. Charter Oak Insurance Company, 31st Conn., 517, it was held: first, that a condition in the policy that no suit should be brought in case of loss, unless within six months after the loss, is valid and binding on the insured. Second, that where a suit was brought at law on the policy within the time limited, which it was found could not be maintained by reason of a mistake in the form of the policy, and a bill in equity was brought while the suit was pending, and after the six months had expired for the correction of the policy, and for an injunction against the defense set up in the action at law it was held that the suit was not barred by the expiration of the term limited. Now, this was a suit in chancery in aid of a suit at law. The suit at law had been commenced within the time limited, and the bill after the time had expired; and the court says, that if relief *alone* had been prayed for, the objection that the time limited in the contract had expired would have been fatal. And why fatal? Because no suit had been brought within the prescribed time for the same subject matter. And the court goes on and says, whatever was asked further may be regarded as barred, without affecting the part of the petition in aid of the suit.

Now here the chancery suit was in aid of the suit at law. But it could not help or aid any cause or thing that was not set up in the suit at law.

This shows that what had been stated in the action at law in time could be set up in another action brought after the time had expired; and the court say that the records of this Court will show we have maintained the integrity of insurance contracts, and the necessity for a strict compliance with all conditions affecting their validity, although in some instances almost to the denial of justice.

And the court further said " The object of the condition evidently " was to prevent delay in the determination of all questions of " loss, and in part to enable the company to know whether a claim " would be prosecuted."

The object of the company has been answered, and it would be unjust to allow such an objection to prevail.

Why has not the object the present defendant had in inserting the limitation contract in the policy, been as fully answered as was the object of the company in the case in the 31 *Connecticut Report* just cited?

The buildings of the plaintiff in this case were burned down on the——day of March, 1862. The suit on the policy vs. the company was commenced on the 10th day of June, 1862, in the Common Pleas Court of Kansas City, and remained undetermined in that Court until the 8th day of June, 1864, when the plaintiff suffered a nonsuit, and on the 28th day of July, 1864, this action was commenced on the same policy and for the same loss in the Common Pleas Court of Saint Louis county, Missouri.

As an incident and a circumstance attending this action, from the time of its commencement in the Kansas City Court of Common Pleas to the time plaintiff suffered nonsuit in 1864, owing to the unsettled state of the country in Western Missouri, no courts were held for the transaction of civil business.

JAMES HUGHES,
of Counsel for Plaintiff in Error.

Supreme Court of the United States.

DECEMBER TERM, 1868.

JESSE RIDDLEBERGHER, Plaintiff in Error,

vs.

THE HARTFORD FIRE INSURANCE CO.

BRIEF FOR DEFENDANT IN ERROR.

R. D. HUBBARD, of Counsel.

Supreme Court of the United States,

DECEMBER TERM, 1868.

JESSE RIDDLEBERGHER, PLAINTIFF IN ERROR,

vs.

THE HARTFORD FIRE INSURANCE COMPANY.

BRIEF FOR DEFENDANT IN ERROR.

THE Policy on which this suit was brought was issued on the 1st day of June, 1861.

The loss sought to be recovered occurred on the 3d day of March, 1862.

The Policy contained the following condition: "*That no suit or action of any kind against said Company for the recovery of any claim upon, under or by virtue of the said Policy shall be sustainable in any Court of Law or Chancery, unless such suit or action shall be commenced within the term of twelve months next after the loss or damage shall occur, and in case any suit or action shall be commenced against said Company after the expiration of twelve months next after such loss or*

damage shall have occurred, the lapse of time shall be taken and deemed as conclusive evidence against the validity of such claim thereby so attempted to be enforced." (See Record, p. 27.)

Suit was brought for loss, under said Policy, on the 18th day of June 1862, and within the time limited in said condition, in the Kansas City Court of Common Pleas, in Jackson County, Missouri.

The Defendants appeared and made answer to the merits of the action. (Record, p. 29.)

On the 8th day of June, 1864, the "Plaintiff dismissed his said action and plea so commenced by him." (Record, p. 29.)

A second suit for the same cause was brought on the 29th day of July, 1864, in the St. Louis Court of Common Pleas. which is the suit now at bar

The Defendants set up in bar to said suit the fact last aforesaid, and the condition contained in said Policy. The Plaintiff, ~~in~~ replied in avoidance, the fact of the former suit, and ~~in~~ its discontinuance. To this there was a demurer.

The question raised on the Record relates, therefore, to the sufficiency of the bar and replication.

I.

AS TO THE BAR.

It has become well ~~authenticated~~ established by repeated judicial decisions that conditions like the one in question are valid in law.

Peoria Ins. Co. *vs.* Whitehill, 25 Ill. 466.
Williams *vs.* Mutual Ins. Co., 20 Vt. 222.
Wilson *vs.* Ætna Ins. Co., 27 Vt. 99.
N. W. Ins. Co. *vs.* Phœnix Oil Co., 31 Penn
Brown and Wife *vs.* Savannah Ins. Co., 24 Ga.
Portage Ins. Co. *vs.* West, 6 Ohio St. 602.
Amesbury *vs.* Bowditch Ins. Co., 6 Gray 603.
Fullam *vs.* N. Y. Ins. Co., 7 Gray 61.
Carter *vs.* Humbolt, 12 Iowa 287.
Stout *vs.* City Ins. Co., Id. 371.
Eagle Ins. Co. *vs.* Lafayette Co., 9 Ind. 443.
Ripley *vs.* Ætna Ins. Co. 29 Barb. 522.
Gooden *vs.* Amoskeag Co. 20 N. H. 73.
Brown *vs.* Roger Williams Co., 5 R. I. 394.
Brown *vs.* Roger Williams Co., 7 R. I. 301.
Ames *vs.* N. Y. Ins. Co., 4 Kern. 253.
Ketchum *vs.* Prot. Ins. Co., 1 Allen, N. B. 186–7.
Lampkin *vs.* Western Assu. Co. Up. Can. 13, Q. B. 273, 361.
Provincial Ins. Co. *vs.* Ætna Ins. Co., Id. 433.
Cray *vs.* Hartford Ins. Co., 1 Blatch. 280.

Tried by the matters contained in this condition—if this alone is to govern the question—there can be no doubt of the sufficiency of the bar set up in the Deft's plea.

damage shall have occurred, the lapse of time shall be taken and deemed as conclusive evidence against the validity of such claim thereby so attempted to be enforced." (See Record, p. 27.)

Suit was brought for loss, under said Policy, on the 18th day of June 1862, and within the time limited in said condition, in the Kansas City Court of Common Pleas, in Jackson County, Missouri.

The Defendants appeared and made answer to the merits of the action. (Record, p. 29.)

On the 8th day of June, 1864, the "Plaintiff dismissed his said action and plea so commenced by him." (Record, p. 29.)

A second suit for the same cause was brought on the 29th day of July, 1864, in the St. Louis Court of Common Pleas. which is the suit now at bar

The Defendants set up in bar to said suit the fact last aforesaid, and the condition contained in said Policy. The Plaintiff, in avoidance, the fact of the former suit, and ~~it~~ its discontinuance. To this there was a demurer.

The question raised on the Record relates, therefore, to the sufficiency of the bar and replication.

I.

AS TO THE BAR.

It has become well ~~authenticated~~ established by repeated judicial decisions that conditions like the one in question are valid in law.

Peoria Ins. Co. *vs.* Whitehill, 25 Ill. 466.
Williams *vs.* Mutual Ins. Co., 20 Vt. 222.
Wilson *vs.* Ætna Ins. Co., 27 Vt. 99.
N. W. Ins. Co. *vs.* Phœnix Oil Co., 31 Penn. 499.
Brown and Wife *vs.* Savannah Ins. Co., 24 Ga. 101.
Portage Ins. Co. *vs.* West, 6 Ohio St. 602.
Amesbury *vs.* Bowditch Ins. Co., 6 Gray 603.
Fullam *vs.* N. Y. Ins. Co., 7 Gray 61.
Carter *vs.* Humbolt, 12 Iowa 287.
Stout *vs.* City Ins. Co., Id. 371.
Eagle Ins. Co. *vs.* Lafayette Co., 9 Ind. 443.
Ripley *vs.* Ætna Ins. Co. 29 Barb. 522.
Gooden *vs.* Amoskeag Co. 20 N. H. 73.
Brown *vs.* Roger Williams Co., 5 R. I. 394.
Brown *vs.* Roger Williams Co., 7 R. I. 301.
Ames *vs.* N. Y. Ins. Co., 4 Kern. 253.
Ketchum *vs.* Prot. Ins. Co., 1 Allen, N. B. 186–7.
Lampkin *vs.* Western Assu. Co. Up. Can. 13, Q. B. 273, 361.
Provincial Ins. Co. *vs.* Ætna Ins. Co., Id. 433.
Cray *vs.* Hartford Ins. Co., 1 Blatch. 280.

Tried by the matters contained in this condition—if this alone is to govern the question—there can be no doubt of the sufficiency of the bar set up in the Deft's plea.

II.

AS TO THE REPLICATION.

But it is claimed that by a statute of Missouri the limitation contained in the contract was so enlarged as to admit of a second suit at any time within one year after the discontinuance of the first. This brings us to the consideration of that Statute. After having provided various periods of limitation for the different kinds of actions, the Statutes of Missouri contain the following section.

"*If any action shall have been commenced within the times respectively prescribed in the preceding articles, and the Plaintiff therein suffer a nonsuit, or after a verdict for him, the judgment be arrested, or after judgment for him the same be reversed on appeal or error, such Plaintiff may commence a new action from time to time within one year after such nonsuit suffered, or such judgment arrested or reversed.*"

2 Rev. Stat. of Mo. 1050.

In answer to this claim I submit the following points:

First.—The status and rights of the parties, with reference to this question, are purely matters of contract and to be determined solely by the provisions of the contract. The parties have made their own standard of limitations and rights. If they are not bound by the general limitations of the Statute, for the same reason they are not bound by the savings of that Statute. There is no escape from this conclusion, except by holding the condition to be null and void.

Second.—The Statute is in its very terms inapplicable to the case at bar. It contemplates such miscarriage in the remedy—and such only—as shall arise under "the preceding articles." It is a saving clause which on its face has reference to the general limitations provided in the Statutes of the State, and not to those special limitations which are made matters of contract between the parties. If parties choose to provide their own limitations, they are left to the law of their own limitations.

Wilson *vs.* Ætna Ins. Co., 27 Vt. R. 99.

The very case now at bar, under a policy with the same condition—under a similar saving statute, recently arose in Rhode Island, and the Court distinctly held that the savings of the Statute have nothing whatever to do with a limitation created by contract and that they had no power from considerations of general equity to import into the contract qualifying terms which the parties had not seen fit to adopt.

Brown *vs.* Roger Williams Ins. Co., 7 R. I. Reps. 301.

Same 58 Stat R 2 p 430

Third.—But assuming the Statute to be applicable to this class of cases, the Plaintiff is not barred by it unless he "suffered a nonsuit" in the first action. Did he suffer a nonsuit in that action?

The Plaintiff in that suit went out of Court under no order or judgment, nor by reason of any defect in form or remedy. The Defendant answered to the merits and the Plaintiff voluntarily and without cause "dismissed" his suit. (Record p. 29.)

It is therefore submitted, 1st, That the Plaintiff is not within the equities and meaning of the Statute, for these were intended to cover only cases of accidental miscarriage, nor, 2d, is he within the letter of the Statute, for in no proper sense can he be said to have suffered a nonsuit.

Stephens on Pleadings, 109.
3 Chitty's Gen. Practice, 784–910.
1 Bouvier's Law Dic. 679, §35–6–7–8.

Bacon Abridgt. Nonsuit

Fourth.—The saving of the Statute being a mere limitation of the remedy cannot be engrafted upon the condition of the Policy, because the condition is not a limitation of the remedy but a condition of the right.

The condition of the contract provides not only that suit must be brought within a specified time, but that the lapse of time shall be taken "*as conclusive evidence against the validity of the claim.*" The right can not exist unless this condition is complied with.

"The bringing of the suit within this period, is made a condition subsequent to the rights of the insured to

recover the loss. The policy was entered into, and the risk assumed with express reference to this among other conditions. It stands upon the footing of other conditions to be found therein. * By the contract between the parties, the right to indemnity in case of loss and the liability of the Company therefore do not become absolute, unless the remedy is brought within the year. The stipulation goes to the right, as well as the remedy."

Per Nelson, J., in

Cray *vs.* Hfd. Fire Ins. Co., 1 Blatch. 289.

"The case in Blatchford is a decision of the Circuit Court in the district of Connecticut, upon a precisely similar provision, and Justice Nelson holds it a defence to the merits of the claim, and calls it a condition subsequent in the contract, by which the right of indemnity for the loss is defeated. I should say it was a condition precedent to the right of recovery, which is the same thing in a different form of words."

Per Redfield, J., in

~~Nelson~~ Wilcox *vs.* Ætna Ins. Co., 27 Vt. 102.

"The condition is evidently a condition subsequent; not a condition precedent operating by defeasance, and the condition is framed with a view to a more effectual operation than that produced by the statute of limitation, which is held to bar the remedy and not the debt."

Ketchum *vs.* Prot. Ins. Co., 1 Allen N. B. 185.

See also, to the same point,

Nute *vs.* Hamilton Ins Co., 6 Gray, 181.
Portage Co., Mut. Ins. Co., *vs.* West, 6 Ohio St. 602.
Williams *vs.* Vt. Mutual, 20 Vt. 231.

So far has this principle been carried, that when a statute of limitation extinguishes not only the right of action, but also the title itself, the statute may be set up in any other country by way of extinguishment.

Smith's L. C. (last Ed.) 955.
Story's Conflict of Laws 487.
Donn *vs.* Lippman, 5 Cl. & Fin. 1.
Huber *vs.* Steiner, 2 Bing. N. C. 202.

If, now, the condition in question be not merely a limitation of the remedy, but a condition of the right, like that relating to the making of proofs within the specified time, or that requiring the insured to submit to an examination, then it is evident:

1. That the assured cannot recover without a strict performance of the condition, and,

2. That a Statute relating only to the remedy cannot be made to affect a provision of the contract relating to the right.

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